Supreme Court, U.S.
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No. ____

In The
Supreme Court of the United States

DONALD R. MARCUCCI AND MARY ELLEN R. MARCUCCI, HUSBAND AND WIFE,

Petitioners

v.

ESB BANK, SUCCESSOR BY MERGER TO TROY HILL FEDERAL SAVINGS BANK, f/k/a TROY HILL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondent

On Petition For Writ of Certiorari
To The Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

As required by the Pennsylvania Deficiency Judgment Act, 42 Pa. C.S.A. § 8103 *et. seq.*, the Respondent filed a motion to schedule a hearing to fix the fair market value of the Petitioners' uncompleted new residential property taken by the Respondent from the Petitioners, to establish a deficiency judgment prior to the Respondent being permitted to take the Petitioners existing residential home. The Court of Common Pleas of Allegheny County, Pennsylvania (the "Trial Court"), without allowing the Constitutionally required hearing or opportunity to cross-examine adverse witnesses and the Trial Court's appointed appraiser, entered an order establishing the fair market value of the uncompleted home. On appeal, the Pennsylvania Superior Court affirmed the Trial Court's Order, finding that there was no hearing requirement under the Pennsylvania Deficiency Judgment Act and that, in any event, an in-chambers meeting with the attorneys for the parties and an opportunity to counter assertions of the adverse party through the filing of a written brief equated to the opportunity to be heard and to confront and cross-examine adverse witnesses as required by the Fourteenth Amendment of the United States Constitution.

The Supreme Court of Pennsylvania affirmed the Pennsylvania Superior Court's Opinion.

The questions presented are:

1. Whether the failure of the Trial Court's fair market valuation determination process for the uncompleted new residential home of Petitioners, taken and sold at a Sheriff's sale, to establish a deficiency judgment prior to the taking of Petitioners' existing residential home, without a hearing or an opportunity for the Petitioners to cross-examine adverse witnesses and the Trial Court's appointed appraiser, denied

the Petitioners' due process rights under the Fourteenth Amendment of the United States Constitution.

2. Whether the Trial Court's determination that an in-chambers meeting with the attorneys for the parties, to voice the Trial Court's decision to appoint a real estate appraiser to appraise the fair market value of a foreclosed residential property and to direct the Petitioners' attorney to participate in memorializing the Trial Court's dictates into a court order, equates to the opportunity to be heard and the hearing requirements of the Fourteenth Amendment of the United States Constitution.

3. Whether the Trial Court's determination that an opportunity to counter assertions of the adverse party through the filing of a written brief equates to the opportunity to confront and cross-examine adverse witnesses as required by the Fourteenth Amendment of the United States Constitution.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Donald R. Marcucci and Mary Ellen R. Marcucci (the "Marcuccis"), respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Pennsylvania affirming the memorandum judgment and opinion of the Superior Court of Pennsylvania and the opinion and order of the Court of Common Pleas of Allegheny County, Pennsylvania in this case.

OPINIONS BELOW

By Per Curiam Order, dated and entered February 16, 2007, the Supreme Court of Pennsylvania denied the Marcuccis' Application for Reconsideration of the Pennsylvania Supreme Court's July 26, 2006 Per Curiam Order (App. 3a). The Marcuccis are unaware of any official or unofficial report of this Order.

By Per Curiam Order, dated and entered July 26, 2006, the Supreme Court of Pennsylvania denied the Marcuccis' Petition for Allowance of Appeal from the Pennsylvania Superior Court's April 1, 2005 Memorandum Opinion and Judgment Order (App. 4a). The Marcuccis are unaware of any official or unofficial report of this Order.

By Per Curiam Order, dated and entered June 9, 2005, the Superior Court of Pennsylvania denied the Marcuccis' Application for Reargument of the Superior Court's April 1, 2005 Memorandum Opinion and Judgment Order affirming the January 13, 2004 Order of the Court of Common Pleas of Allegheny County, Pennsylvania (App. 5a). The Marcuccis are unaware of any official or unofficial report of this Order.

By Memorandum Opinion and Judgment Order, dated and entered April 1, 2005, the Superior Court of Pennsylvania, without oral argument, affirmed the January 13, 2004 Order of the Court of Common Pleas of Allegheny

County, Pennsylvania, in connection with that court's June 6, 2003 Order (App. 6a-15a). The Marcuccis are unaware of any official or unofficial report of this Opinion and Order.

By Opinion, dated and entered March 24, 2004, the Court of Common Pleas of Allegheny County, Pennsylvania memorialized its opinion with respect to its January 13, 2004 Fair Market Value Judgment Order (App. 16a-20a). The Marcuccis are unaware of any official or unofficial report of this Opinion.

By Order, dated February 17, 2004, the Court of Common Pleas of Allegheny County, Pennsylvania denied the Marcuccis Petition for Reconsideration of its January 13, 2004 Fair Market Value Judgment Order (App. 21a-22a). The Marcuccis' are unaware of any official or unofficial report of this Order.

By Judgment Order, dated and entered January 13, 2004, without a hearing, the Court of Common Pleas of Allegheny County, Pennsylvania fixed the fair market value of the Marcuccis' uncompleted new residential home taken by the Respondent to be $350,000 (App. 23a-24a). The Marcuccis are unaware of any official or unofficial report of this Order.

By Order, dated and entered June 6, 2003, the Court of Common Pleas of Allegheny County, Pennsylvania, decreed its appointment of a real estate appraiser to determine the fair market value of the Marcuccis' uncompleted new residential home taken by the Respondent (App. 25a-26a). The Marcuccis are unaware of any official or unofficial report of this Order.

JURISDICTION

The Per Curiam Order of the Supreme Court of Pennsylvania denying the Marcuccis' Petition for Allowance of Appeal was entered on July 26, 2006. The Marcuccis timely petitioned the Pennsylvania Supreme Court for

reconsideration of this Order, which was denied on February 16, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part, "nor shall any State deprive any person of life, liberty or property, without due process of law." See pages 37a-38a of Appendix A.

The provisions of the Pennsylvania Deficiency Judgment Act, 42 Pa.C.S.A. § 8103 *et. seq.* are set forth in Appendix A, App. 39a-43a.

Consistent, inconsistent and conflicting deficiency judgment legislation of various States is set forth in Appendix A, App. 44a-68a.

STATEMENT

This Petition for a Writ of Certiorari has it roots in a construction loan agreement executed by the Marcuccis with the Respondent, ESB Bank, the successor through takeover to Troy Hill Federal Savings Bank, (the "Bank").

I. Factual Background.

The Marcuccis[1] executed a mortgage on or about May 22, 1992 in connection with the $500,000 construction loan agreement between the Bank and the Marcuccis for the construction of the Marcuccis' new residence at 2544 Heartwood Drive, Upper St. Clair Township, Pennsylvania (the "Heartwood Property"). The executed construction loan and mortgage agreements were not given to the Marcuccis at

[1] The Marcuccis are senior citizens. Donald Marcucci is sixty-one years old and resides in a rented townhouse in Orlando, FL. Mary Ellen Marcucci will be sixty in July, and resides in the Weston Property.

the closing, despite their insistence, but purported copies were subsequently left on the front doormat of their home at 2313 Weston Drive, Upper St. Clair Township, Pennsylvania (the "Weston Property") along with a revised truth-in-lending statement by the attorney for the Bank.

During the construction of their new Heartwood Property residence, the unilateral actions of the Bank, to restructure its loan portfolio in an effort to make itself a more desirable merger partner, resulted in the filing of a lawsuit by the developer of the Heartwood Property against the Marcuccis. Thereafter, the Bank unilaterally converted the Marcuccis' construction loan into a conventional mortgage, and refused to loan the Marcuccis the remaining almost $158,000 balance of the funds that the Bank was obligated to provide to the Marcuccis under the construction loan agreement.

These unilateral actions of the Bank breached the construction loan agreement and prevented the Marcuccis from completing construction of their new residence. Therefore, after paying over $127,000 to the Bank under the construction loan/mortgage, on the advice of their attorneys, based upon the Bank's refusal to loan the balance of the construction loan funds, the Marcuccis made the last of the $2,773.52 monthly construction/mortgage payments to the Bank on October 10, 1997. A mortgage foreclosure action by the Bank followed on April 13, 1998. And, on September 1, 1999, summary judgment was entered in favor of the Bank for foreclosure on the Heartwood Property and in favor of the Marcuccis on cross summary judgment as it related to foreclosure on their Weston Property home.

During the initial litigation period with the Bank, the Marcuccis received various offers to purchase the Heartwood Property for amounts between $350,000 and $425,000. However, the Bank refused to permit the Marcuccis to accept any of these offers, and instead chose to foreclose on the Heartwood Property. On January 21, 2000, the Bank

obtained a foreclosure judgment of $408,206.04 against the Marcuccis on the Heartwood Property, and purchased it in a Sheriff's sale on April 3, 2000. On September 29, 2000, the Bank petitioned the Trial Court to fix the fair market value of the Heartwood Property in accordance with the Pennsylvania Deficiency Judgment Act, 42 Pa. C.S.A. § 8103 *et. seq.*; alleging that its fair market value was only $315,000, minus $8,843.93 in alleged tax liens, which the Bank had gratuitously paid. Thereafter, in January 2001, without even listing the Heartwood Property on the Allegheny County Real Estate Sales Multilist, the Bank sold the Heartwood Property for only $310,000. This was $115,000 below the $425,000 purchase offer which the Bank previously refused to let the Marcuccis accept in November 1999. There would have been no deficiency at all if the Bank had permitted the Marcuccis to accept the $425,000 purchase offer.

On July 30, 2001, the Pennsylvania Superior Court overturned that part of the Trial Court's judgment in favor of the Marcuccis as it related to the Bank's foreclosure on the Weston Property, and, on October 15, 2002, the Pennsylvania Supreme Court denied the Marcuccis' November 2, 2001 Petition for Allowance of Appeal of the Superior Court's decision. Thereafter, on February 12, 2003, the Court of Common Pleas of Allegheny County, Pennsylvania granted summary judgment for foreclosure in favor of the Bank on the Marcuccis' Weston Property home.

II. Proceedings Below

On March 3, 2003, the Bank filed a motion to schedule a hearing to fix the fair market value of the Heartwood Property after being required to do so by the Marcuccis in order to comply with Pennsylvania Deficiency Judgment Act, 42 Pa. C.S.A. § 8103 *et. seq.* Thereafter, on June 6, 2003, the Trial Court, without holding the required hearing, and over the objections of the Marcuccis, decreed its

appointment of a real estate appraiser to appraise the Heartwood Property.

On January 13, 2004, the Trial Court, again without allowing a hearing on the matter, entered an Order fixing the fair market value of the Heartwood Property at the $350,000 amount determined by its appointed appraiser. This was $75,000 less than the $425,000 purchase offer received by the Marcuccis for the uncompleted Heartwood Property prior to the foreclosure, which the Bank refused to let the Marcuccis accept.

The Marcuccis then appealed the Trial Court's Orders to the Pennsylvania Superior Court. On April 1, 2005, also without the benefit of an oral argument, the Superior Court affirmed the Trial Court's determination. In its opinion, the Pennsylvania Superior Court, inter alia, failed to rectify the Trial Court's denial of the Marcuccis' Constitutional due process rights, found that there was no requirement for a hearing under the Pennsylvania Deficiency Judgment Act and equated participation, at the Trial Court's direction, in the drafting of the Trial Court's June 6, 2003 Order and the opportunity to file a written brief in opposition to the Bank's assertions, to the Constitutionally required opportunity to be heard and cross-examine adverse witnesses.

The Marcuccis timely petitioned the Superior Court for reargument on April 15, 2005, but their Petition was denied by Per Curiam Order dated June 9, 2005.

Thereafter, the Marcuccis timely filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court on July 11, 2005. This Petition was denied by the Pennsylvania Supreme Court in a Per Curiam Order dated July 26, 2006. The Marcuccis then timely filed an Application for Reconsideration of Allowance of Appeal with the Pennsylvania Supreme Court on August 9, 2006.

The Pennsylvania Supreme Court denied this Application in a Per Curiam Order dated February 16, 2007.

REASONS FOR GRANTING THIS PETITION

The failure of the Trial Court's fair market value determination process, as affirmed by the Pennsylvania Superior Court and the Pennsylvania Supreme Court, to provide neither a hearing nor an opportunity for the Marcuccis to cross-examine the Bank's witnesses and the Trial Court's appointed appraiser denied the Marcuccis their Fourteenth Amendment due process rights. The decision conflicts with the principles and requirements set forth by this Court in its due process decisions and the due process decisions of other federal courts and the highest courts of other States, and is blatantly wrong.

The Pennsylvania courts unconstitutionally equated an in-chambers meeting with the parties' attorneys at the time to voice the Trial Court's decision to appoint a real estate appraiser to appraise the Heartwood Property, to the Constitutionally required "opportunity to be heard" in an evidentiary hearing in direct conflict with this Court's due process decisions. They also unconstitutionally equated an opportunity to counter written assertions provided by the Bank's witnesses through the filing of a written brief, to the Constitutionally required opportunity to confront and cross-examine adverse witnesses, also in direct conflict with this Court's due process decisions.

The Pennsylvania courts' decision in this case cannot be squared with the fairness concerns underlying the due process requirements of the Fourteenth Amendment, this Court's due process precedents or the hearing requirements crafted into the Pennsylvania Deficiency Judgment Act, 42 Pa. C.S.A. § 8103 *et. seq.*, by the Pennsylvania General Assembly to comply with the Fourteenth Amendment.

This Court should insist that foreclosed mortgagors like the Marcuccis be provided a proper hearing to adequately defend themselves against the claims of banks and predatory lenders alike, and cross-examine adverse witnesses and any court appointed experts about any errors, inconsistencies and inadequacies in their written opinions. This Court should not let the due process rights of mortgagors like the Marcuccis to be cast aside by the Pennsylvania courts or the courts and legislatures of other States. With the skyrocketing number of mortgage foreclosures taking place throughout the United States in general, and Pennsylvania in particular, the decision of the Pennsylvania courts in the instant case will have a detrimental impact on countless millions of property owners, especially if its unconstitutional premises are permitted to propagate to other States without correction by this Court.

In fact, the legislation of the States is in disarray in this critical mortgage foreclosure deficiency judgment area; and their courts that have addressed the issue are deeply divided. Some States require evidentiary hearings, just like the Pennsylvania Deficiency Judgment Act requirements that were emasculated by the Pennsylvania courts; some States require an appraisal by appraisers that are not subject to examination, a process found unconstitutional by the Supreme Court of Connecticut;[2] some States leave the decision totally to the discretion of their courts; some States simply permit the court clerk to issue the deficiency judgment; some States combine a hearing with a mutually agreed appraisal process under which the appraisers are subject to cross-examination; and the rest of the States appear to have no relevant legislation.

Thus, it is imperative that this Court provide its guidance to the Pennsylvania courts and the courts and legislatures of the other States on the due process requirements of the

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[2] *Society for Savings v. Chestnut Estates, Inc.*, 409 A.2d 1020 (Conn. 1979).

Constitution's Fourteenth Amendment, especially when it involves the permanent deprivation of real property rights, to ensure that this Court's procedural due process precedents are applied for the benefit of the countless millions of foreclosed mortgagors in similar circumstances as the senior Marcuccis. Absent such guidance, the flouting of the due process principles by the Pennsylvania courts and, potentially, the highest courts and legislatures of other States threatens to undermine this Court's due process framework as enumerated in *Goldberg v Kelly,* 397 U.S. 254 (1970), *Fuentes v Shevin,* 407 U.S. 67 (1972), *Mathews v. Eldridge,* 424 U.S. 319 (1976), *Connecticut v. Doehr*, 501 U.S. 1 (1991), *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1995) and their progeny.

I. THE TRIAL COURT'S DECISION FIXING THE FAIR MARKET VALUE OF THE HEARTWOOD PROPERTY WITHOUT A HEARING OR AN OPPORTUNITY FOR THE MARCUCCIS TO CROSS-EXAMINE ADVERSE WITNESSES AND ITS APPOINTED APPRAISER DENIED THE MARCUCCIS' FOURTEENTH AMENDMENT DUE PROCESS RIGHTS.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, that an individual's life, liberty or property may not be taken without due process of law. "A fundamental requirement of due process is 'the opportunity to be heard.'" *Armstrong v. Manzo,* 380 U.S. 545, 558 (1965), *quoting, Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The failure of the Trial Court's fair market value determination process to provide either a hearing or an opportunity for the Marcuccis to cross-examine the Bank's witnesses and the Trial Court's appointed appraiser about numerous errors, inconsistencies and inadequacies in their written appraisals denied the Marcuccis their United States Constitution Fourteenth Amendment due process rights.

"For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard....'" *Fuentes v. Shevin,* 407 U.S. 67, 86 (1972), *rehearing denied,* 409 U.S. 902 (1972).

The Opinions and Orders of the Pennsylvania Superior Court and the Pennsylvania Supreme Court ignored these due process questions and the three factors of principal relevance to the determination of the appropriate due process owed, as laid down by this Court in *Mathews v. Eldridge,* 424 U.S. 319 (1976), and re-enumerated by this Court in *Connecticut v. Doehr,* 501 U.S. 1 (1991), where, as in the instant case, a private party is the property taker rather than a governmental entity. It is well settled that "due process requires that an owner whose property is taken for public use must be given a hearing in determining just compensation." *Walker v. City of Hutchinson,* 352 U.S. 112, 115 (1956). And these same due process requirements apply equally to the fair market value determination (just compensation) of an owner's residential property under a construction loan that has already been taken by a private party prior to that party being permitted to take the existing home of such owner, as in the instant case.

Thus, there can be no question that under the Fourteenth Amendment the Marcuccis had the right to cross-examine the Bank's witnesses and the Trial Court's appointed real estate appraiser, and to present oral testimony and other evidence in a hearing before the Trial Court, prior to any adjudication by the Trial Court of the fair market value of the Heartwood Property. As noted by this Court, a defendant's "right to litigate the issues raised" is a "right guaranteed to him by the Due Process Clause." *United States v. Armour & Co.,* 402 U.S. 673, 682 (1971). This Court has repeatedly stated that, "[d]ue process requires that there be an opportunity to present every available defense." *Lindsey v.*

Normet, 405 U.S. 56, 66 (1972), *quoting, American Surety Co. v. Baldwin,* 287 U.S. 156, 168 (1932).

"Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing ...." *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950).

It is fundamental that property cannot be taken without procedural due process. *Connecticut v. Doehr*, 501 U.S. 1 (1991), *Mathews v. Eldridge,* 424 U.S. 319 (1976), *Fuentes v. Shevin,* 407 U.S. 67 (1972), rehearing denied 409 U.S. 902 (1972). And, "[t]he questions of whether there will be a deficiency owed, and of how much, constitute valid property interests." *Society for Savings v. Chestnut Estates, Inc.,* 409 A.2d 1020, 1024 (Conn. 1979).

There is no authority which permitted the Pennsylvania courts to deny the Marcuccis that opportunity, or justified the Trial Court's failure to hold the required hearing. Where important decisions turn on the facts, due process requires an opportunity to confront and cross-examine witnesses. *Goldberg v. Kelly,* 397 U.S. 254 (1970). The Marcuccis were given no such opportunity. And, "even a hearing which excludes consideration of an element essential to the decision does not meet this standard." *Bell v. Burson*, 402 U.S. 535, 542 (1971). The Trial Court's failure to hold a hearing excluded many elements essential to the fair market value determination of the Heartwood Property.

This fact is even demonstrated in the Pennsylvania Superior Court's Opinion. The Superior Court stated in that Opinion that the Marcuccis had failed to produce any evidence that they had paid the real estate taxes on the Heartwood Property, which were allegedly the subject of the liens alleged on that property, and deducted from the Trial

Court's fair market value determination; and therefore the Superior Court noted that it was constrained to find that the Marcuccis failed to prove their claim. App. 13a. What the Pennsylvania Superior Court failed to recognize was that this was exactly the crux of the Marcuccis complaint; they were prepared to present this evidence but were not given the Constitutionally required evidentiary hearing in which they could present it. Despite the exclusion of this relevant evidence by the Trial Court's refusal to conduct a proper evidentiary hearing, the Trial Court erroneously stated that "additional hearings would simply have been a reiteration of the facts, evidence and appraisals." App. 19a.

As this Court noted in *Mathews*, "Procedural due process rules are shaped by the risk of error inherent in the truth finding process." *Supra* at 344. By denying the Marcuccis the opportunity to cross-examine the Bank's witnesses and the Trial Court's appointed appraiser about obvious errors, inconsistencies and unconventional, unsupported statements and methods used in their appraisals, and to present all of their evidence, the Trial Court's process presented too great a risk for error in the deprivation of the Marcuccis' property, in clear violation of their Constitutional due process rights.

This Court should grant certiorari to confirm that a defendant's Constitutional rights to procedural due process may not be compromised or abrogated though a trial process, however expedient it may appear to be to the Trial Court.

II. THE TRIAL COURT'S FAILURE TO HOLD A HEARING OR PROVIDE THE MARCUCCIS AN OPPORTUNITY TO CROSS-EXAMINE ADVERSE WITNESSES AND ITS APPOINTED APPRAISER CONFLICTS WITH THE DUE PROCESS DECISIONS OF THIS COURT.

Although this Court has not directly addressed the facts presented in the instant case, the decision of the

Pennsylvania courts clearly conflicts with the due process requirements of the Fourteenth Amendment as established by this Court in its due process decisions.

A. Conflicts with this Court's decision in *Goldberg*.

The question presented to the Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970), was whether a State that terminates a recipient's public assistance payments without providing an opportunity for an evidentiary hearing prior to the termination violated the recipients' due process rights under the Fourteenth Amendment. The Court held that even when welfare is discontinued, procedural due process requires that a pre-termination evidentiary hearing be provided to the recipient. And, since New York's welfare termination procedure did not permit the recipient to orally present evidence or to confront or cross-examine adverse witnesses, the procedure was held to be Constitutionally inadequate.

In so finding, the Court noted that due process principles require an effective opportunity to defend by confronting adverse witnesses and presenting arguments and evidence orally. The Court also noted that written submissions do not provide the flexibility of oral presentations, nor permit the defendant to mold his argument to the issues that the decision maker seems to regard as important. In addition, where the credibility or veracity of the evidence or witnesses may be an issue, the Court found that written submissions are a wholly unsatisfactory basis for the decision.

The required *Goldberg* opportunities to defend by confronting adverse witnesses and by presenting arguments and evidence orally were not provided to the Marcuccis by the Pennsylvania courts, even though their decision evoked a final deprivation of the Marcuccis' real property rights. In fact, the Pennsylvania courts read the hearing requirement out of the Pennsylvania Deficiency Judgment Act altogether. In its Opinion, the Pennsylvania Superior Court noted that,

"Our reading of the Deficiency Judgment Act reveals no directive that a hearing is required in order to determine the FMV of property. While admittedly, as argued by appellants, there is reference to "hearings" in the Act, there is no mandate that one be conducted prior to fixing the FMV." In so finding, however, the Pennsylvania Superior Court failed to consider that the Pennsylvania Deficiency Judgment Act was crafted by the Pennsylvania General Assembly to comply with the due process dictates of the Fourteenth Amendment.

The Deficiency Judgment Act does not merely make reference to a hearing, as incredibly found by the Pennsylvania Superior Court. The Pennsylvania General Assembly specifically used the words "hear" or "hearing" three times in the Act; "but no testimony is produced at the hearing," "the court shall hear evidence" and "after the hearing;" and expressly used the word shall; "the court shall hear evidence," not the permissive "may." App. 39a-43a. This was not by happenstance.

The Pennsylvania Superior Court then unconstitutionally equated the Trial Court's in-chambers meeting with the parties' attorneys at the time to an "opportunity to be heard" in an evidentiary hearing. After finding that there was no requirement under the Deficiency Judgment Act for a hearing, the Pennsylvania Superior Court stated,

> "That being said, ... the parties did meet in the trial judge's chambers prior to the execution of the June 6, 2003 Order that directed, in great detail, what was required to be considered by the assigned real estate appraiser. Appellants admit they provided input to that Order, although it is now counsel's contention their input was coerced, given only in an effort to protect their clients in light of the trial court's alleged refusal to conduct an evidentiary hearing." App. 10a.

The parties, their attorneys, and witnesses were assembled in the courtroom on June 3, 2003 for the required Deficiency Judgment Act fair market value hearing, but the trial judge refused to hold the hearing and never entered the courtroom. Instead, the judge attempted to force a settlement, over the voiced objections of the Marcuccis through their attorney. When the trial judge was unable to force a settlement, he called the parties' attorneys into chambers to inform them of his decision to appoint an appraiser to appraise the Heartwood Property, also over the voiced objections of the Marcuccis through their attorney. The mere fact that there was no record of this in-chambers meeting to document the Marcuccis' objections to the refusal to hold the hearing and appoint the Trial Court's appraiser demonstrates that this meeting was not as misapprehended by the Pennsylvania Superior Court.

Further compounding its errors, the Pennsylvania Superior Court continued in its Opinion, to find that, "Contrary to the appellants' argument, they were provided the opportunity to counter information provided by appellee relative to the FMV. In compliance with the [trial] court's Order of March 3, 2003 directing that discovery be completed by June 3, 2003, appellants prepared and submitted a through, extensive and detailed brief in reply to the petition to fix the FMV." App. 10a. However, no matter how detailed, extensive or through the brief submitted by the Marcuccis was, the opportunity to submit a brief does not equate to the Constitutional due-process required opportunity to confront and cross-examine adverse witnesses. "Moreover, written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important." *Goldberg v. Kelly,* 397 U.S. 254, 266 (1970). "[W]here important decisions turn on the facts,

due process requires an opportunity to confront and cross-examine witnesses." *Goldberg, supra.*

In their briefs to the Pennsylvania courts and their Petition for Reconsideration of the Trial Court's Order fixing the fair market value of the Heartwood Property (App. 27a-36a), the Marcuccis outlined in excruciating detail, the information that they would have solicited from the Bank's appraiser and the Trial Court's appraiser about the errors, inconsistencies and inadequacies in their appraisals and the unconventional, unsupported method used by the Bank's appraiser on which the Marcuccis would have been able to conduct a proper cross-examination, if the Marcuccis had been given the opportunity to confront and cross-examine them at the required hearing. The Trial Court's failure to hold the required hearing excluded many elements essential to a Constitutional due process compliant determination of the fair market value of the Heartwood Property. The Marcuccis were denied the opportunity to be heard at "a meaningful time" and in "a meaningful manner," which was not rectified by an opportunity to provide a written brief. See *Armstrong v Manzo,* 380 U.S. 545, 552 (1965). In fact, the Marcuccis were never given the opportunity to even counter the errors, inconsistencies and inadequacies in the appraisal of the Trial Court's appraiser through a written statement.

This Court should grant certiorari to make it clear to the courts of Pennsylvania and the other States that, under *Goldberg*, individuals like the Marcuccis must be given an opportunity for a meaningful judicial hearing, including the opportunity to present oral evidence and cross-examine adverse witnesses and the court's "so called" experts before they are permanently deprived of their real property.

B. Conflicts with this Court's decision in *Fuentes.*

The question presented to the Court in *Fuentes v Shevin,* 407 U.S. 67 (1972), was whether State statutes which

authorize the summary seizure of goods in a person's possession under a writ of replevin, prior to a hearing on the rights of the parties to such goods, violated such person's due process rights under the Fourteenth Amendment. The Court struck down the Florida and Pennsylvania prejudgment replevin statutes in question, since they failed to provide for pre-deprivation notice and an opportunity to be heard, even though the opportunity for a post-deprivation hearing was provided, unlike in the instant case. The Court noted that,

> "The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions,... Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment - - to minimize substantively unfair or mistaken deprivations of property, a danger that is especially great when the State seizes goods simply upon the application of and for the benefit of a private party." *Id.* at 80.

The Court further noted that the right to a prior hearing is not a new principle of Constitutional law, for the Court has long recognized this right under the Fourteenth Amendment. The Court reiterated its traditional due process principles that the "opportunity for the hearing must be provided before the property deprivation at issue takes effect" and that the "root requirement" of due process is "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Id.* at 82, *quoting, Boddie v. Connecticut,* 401 U.S. 371, 378-379 (1971) (emphasis in original).

The decision of the Pennsylvania courts in this case flies in the face of the principles enumerated by the Court in *Fuentes*. As set forth previously, the Pennsylvania courts conclusively deprived the Marcuccis of their property without a hearing, and even read the hearing requirements out of the Pennsylvania Deficiency Judgment Act.

An essential element of due process is the opportunity to confront and cross-examine witnesses during an evidentiary hearing. And, even an alleged substitute for a hearing which excludes consideration of an element essential to the decision does not meet this standard. *Bell v. Burson*, 402 U.S. 535, 542 (1971). The Trial Court's failure to hold the required hearing excluded many elements essential to a Constitutional due process compliant determination of the fair market value of the Heartwood Property. "[A]s a minimum, ... persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971). "For when a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivation of property interests can be prevented." *Fuentes, supra,* at 81.

The Marcuccis were not given the required opportunity for a hearing prior to the permanent deprivation of their real property, which was not rectified by an opportunity to provide a written brief. Thus, this Court should grant certiorari to make it clear and certain to the Pennsylvania courts and the courts of other States that, under *Fuentes*, individuals like the Marcuccis must be given an opportunity for a meaningful judicial hearing, including the opportunity to present oral evidence and cross-examine adverse witnesses, before they are permanently deprived of their real property.

C. Conflicts with this Court's decision in *Mathews*.

The issue presented to the Court in *Mathews v. Eldridge,* 424 U.S. 319 (1976), was whether due process requires that prior to the termination of Social Security disability benefits the recipient be afforded an opportunity for an evidentiary hearing. Although the Court permitted the termination of these benefits without a formal evidentiary hearing prior to the termination, the Court stressed that its decision was based upon the fact that the recipient was given the opportunity to make extensive written submissions prior to the initial termination decision and was then provided the opportunity for a prompt post-termination evidentiary hearing. However, the hearing-less termination of the Marcuccis' real property rights came with no opportunity for a post-termination evidentiary hearing. The deprivation worked by the decision of the Pennsylvania courts was final. Prior to that decision, the due process principles elucidated by the Court required that the Marcuccis be provided a full evidentiary hearing, including the opportunity to present their arguments and evidence orally and to confront and cross-examine adverse witnesses.

In making its decision in *Mathews,* the Court noted that:

> "identification of the specific dictates of due process generally requires the consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

The Pennsylvania courts, in making the decision in the instant case, failed to consider any of the three prongs set

forth by this Court in *Mathews,* and therefore rendered a decision which runs roughshod over the Marcuccis' due process rights and this Court's procedural due process dictates. Accordingly, this Court should grant certiorari to make it clear to the Pennsylvania courts that the balancing process, mandated by *Mathews*, must be utilized when making a due process determination.

D. Conflicts with this Court's decision in *Doehr.*

In the case of *Connecticut v. Doehr*, 501 U.S. 1 (1991), the Court invalidated, on due process grounds, a Connecticut statute that permitted a party suing for personal injuries to seek a prejudgment attachment of the defendant's real estate to guarantee the judgment. Contrary to the Pennsylvania courts, which held in the instant case that a hearing was not required even for a permanent taking of a person's real estate by a private party, the Court found that a hearing was required even for a prejudgment (and potentially only temporary) taking of a person's real estate by a private party.

In so holding, the Court adapted the formal balancing test that it established in *Mathews v. Eldridge,* 424 U.S. 319 (1976), for the governmental taking of an individual's property to the private taking of such property.

The duration of any potentially wrongful deprivation of a property interest is an important factor in assessing the impact on the private interest involved. *Fusari v. Steinberg*, 419 U.S. 379, 389 (1975). In applying this first part of the *Doehr* test to the private interest affected, the Court found "that even the temporary or partial impairments to property rights that attachments, liens, and similar encumbrances entail are sufficient to merit due process protection." *Id.*, at 12. Thus, under *Doehr,* the permanent taking of the Marcuccis' real property authorized by the Pennsylvania courts required the mandatory full due process hearing, not just the opportunity to file a written brief and the opportunity

for the Marcuccis' attorney to participate in memorializing the Trial Court's decision to appoint its own appraiser.

The risk of an erroneous deprivation posed by such a procedure is too substantial, and also fails the second part of the *Doehr* test, especially in light of the $425,000 purchase offer[3] that the Marcuccis received for the Heartwood Property. If the Bank had permitted the Marcuccis to accept such offer, the $408,206.04 judgment would have been fully satisfied, there would not have been any deficiency and the instant case would not exist. Yet, without the required hearing, the Trial Court determined that the fair market value of the Heartwood Property was only $350,000.

The second inquiry about the risk of error cannot really be separated from the first inquiry about the private interest at stake. The more serious the consequences for the individual, the smaller the risk of error that can be accepted. *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78 (1978), n.8. There are no more serious consequences in the deprivation of an individual's property than the permanent deprivation of that property, as in this case. Inherently, the substantial risk of error in the appraisal evidence on which the Trial Court relied without providing the Marcuccis the opportunity to cross-examine the Bank's witnesses and the Trial Court's appointed appraiser is not Constitutionally acceptable.

Unlike determining the existence of a debt or delinquent payments, the determination of the fair market value of the Marcuccis uncompleted Heartwood property does not concern "ordinary uncomplicated matters that lend themselves to documentary proof." See *Mitchell v. W. T.*

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[3] The purchase offer amount is also more consistent with the IRS' definition of fair market value; i.e. "The price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of the relevant facts." Treas. Reg. § 20.2031-1(b).

Grant Co., 416 U.S. 600, 609 (1974). The Trial Court attempted to justify its failure to hold the required hearing in its March 23, 2004 Opinion, by stating that the Trial Court's appointed expert "took into account the cost of completing construction of the Property" and also "inspected the Property and considered all of the prior appraisal reports, offers for Sale, the January, 2001 Sale to the current owner, and all other information which was submitted to the [Trial] Court by each of the parties on June 3rd, 2003." App. 19a.

However, the only documentation presented by the Trial Court's appraiser for her determination of the fair market value of the Heartwood Property was the traditional real estate appraiser's sales comparison report, which improperly compared the uncompleted Heartwood Property to properties that were not comparable even if the Heartwood Property was envisioned to be in its completed state. And, even that report contained obvious errors, inconsistencies and inadequacies, such as *inter alia* omitting the third floor and cupola, which the Marcuccis were denied the opportunity to explore with the appraiser during the required hearing. The Trial Court's appraiser neither offered nor presented any documentation which demonstrated how she considered and/or dealt with any of the other items which she supposedly considered in arriving at her determination. But, even if that documentation had been prepared, there is no authority which permitted that documentation to substitute for the required opportunity for the Marcuccis to cross-examine the Bank's witnesses and the Trial Courts' appointed appraiser during a hearing.

The Trial Court in its March 23, 2004 Opinion, also asserted that the Trial Court considered all the evidence and information necessary for the Trial Court to make its fair market value determination. App. 19a. However, the Trial Court could not have considered all of the relevant evidence bearing on, and required to determine, the fair market value

of the Heartwood Property since the Trial Court refused to hold the required hearing necessary to permit that evidence to be presented by the Marcuccis to the Trial Court.

If the Trial Court had held the required hearing, it would have heard that the preferred and most appropriate method for establishing the fair market value of a unique, uncompleted residential property like the Heartwood Property is the reproduction cost approach. Using this approach the Trial Court would have seen that the fair market value of the Heartwood Property as of April 2000 was really over $600,000 based on the value of its lot and the amount invested in its construction at that point, most of which was authorized and paid by the Bank after it inspected the construction.

A primary function of legal process is to minimize the risk of erroneous decisions. *Greenholtz v. Nebraska Penal Inmates,* 442 U.S. 1, 12-13 (1979); *Addington v. Texas*, 441 U.S. 418, 423 (1979). The Pennsylvania courts did not employ that function in the process they authorized in determining the fair market value of the Marcuccis' Heartwood Property. The Marcuccis were Constitutionally entitled to an effective opportunity to confront and cross-examine adverse witnesses and present their own evidence orally, especially where, as in the instant case, the Marcuccis challenged the proposed fair market value determination as resting on the incorrect information presented by Bank's and the Trial Court's appraisers, and the Trial Court's misapplication of the $425,000 purchase offer to the Heartwood Property's real fair market value. "[W]here important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly,* 397 U.S. 254, 266 (1970).

Lastly, the third part of the *Doehr* test, requires the court to balance the State interests served by the summary

procedures used and the administrative and fiscal burdens, if any, that would result from the substitute procedures sought. There is no legitimate State interest in not permitting the Marcuccis a full evidentially hearing with an opportunity to confront and cross-examine adverse witnesses and present their own evidence and analysis orally. The Trial Court's excuse was that a hearing would simply have been a reiteration of the written facts, evidence, and appraisals already considered by the Trial Court. This excuse, however, is akin to the Constitutionally defective speed and efficiency argument.

> "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones." *Stanley v. Illinois*, 404 U.S. 645, 656 (1972).

This Court should grant certiorari to make it clear and certain to the courts of Pennsylvania and the other States that, under *Doehr*, prior to the permanent termination of real property interests, the individual must be given a full opportunity to present oral evidence and cross-examine adverse witnesses, and that speed and efficiency are not a Constitutionally acceptable excuse for failing to provide that opportunity.

E. Conflicts with this Court's decision in *Good*.

In *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1995), the Court held that the due process clause requires an opportunity to be heard in civil forfeiture proceedings for real estate. The Court stated that, "The right

to ... a hearing is central to the Constitution's command of due process." *Id.* at 53. The Court further stated that, "We tolerate some exceptions to the general rule requiring predeprivation notice and hearing, but only in 'extraordinary situations where some governmental interest is at stake that justifies postponing the hearing until after the event.'" *Id.* at 53, *quoting*, *Fuentes v Shevin,* 407 U.S. 67, 82 (1972).

No extraordinary situation existed in the instant case, and when the Pennsylvania courts' hearing-less decision authorized a permanent deprivation of the Marcuccis' real property interest, there was not a mere postponement of the required hearing, there was no hearing at all.

The Court emphasized that a person's right to maintain control over his home is a significant "private interest of historic and continuing importance." *Id.* at 53-54. "The seizure of a home produces a far greater deprivation than the loss of furniture, or even attachment." *Id.* at 54. However, the Pennsylvania courts failed to understand the significant Constitutional infirmity that the Court places on the taking of real property interests without a pre-deprivation hearing, as reaffirmed by the Court in *Good.*

Accordingly, this Court should grant certiorari to make it clear to the courts of Pennsylvania and the other States that, under *Good*, prior to the permanent termination of an individual's real property interests, the individual must be given an evidentiary hearing, including the opportunity to present oral evidence and cross-examine adverse witnesses.

III. THE TRIAL COURT'S FAILURE TO HOLD A HEARING OR PROVIDE THE MARCUCCIS AN OPPORTUNITY TO CROSS-EXAMINE ADVERSE WITNESSES AND ITS APPOINTED APPRAISER CONFLICTS WITH THE DUE PROCESS DECISIONS OF THE HIGHEST COURTS OF OTHER STATES.

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A. Conflicts with the Connecticut Supreme Court's decision in *Society for Savings.*

In *Society for Savings v. Chestnut Estates, Inc.*, 409 A.2d 1020 (Conn. 1979), the Connecticut Supreme Court declared unconstitutional a Connecticut statute which required that a deficiency judgment in mortgage foreclosures be determined by an appraisal of the foreclosed property by three appraisers, who were not subject to examination on their appraisal, and which appraisal was deemed to be final and conclusive as to the value of the foreclosed property. Based on the due process guidelines established by this Court, the Connecticut Supreme Court noted that, "The statute is constitutionally defective both because it does not require that the defendant be afforded an opportunity to participate in the determination of the value of the property by presenting evidence and because it does not provide the opportunity for cross-examination." *Id.* at 1025. The Connecticut Supreme Court further found it unacceptable that the judgments of the appraisers may be formed by inaccurate outside evidence which is untested by adversary methods.

The decision of the Pennsylvania courts in the instant case directly conflicts with this decision of the Connecticut Supreme Court. The process endorsed by the Pennsylvania courts is essentially the same court-appointed, untested appraisal opinion that that the Connecticut Supreme Court found Constitutionally deficient. Exactly as feared by the Connecticut Supreme Court, the Marcuccis were not provided the Constitutionally required opportunity to cross-examine either the Trial Court's appointed appraiser or the Bank's appraiser, on obvious errors, inconsistencies and inadequacies in their appraisals. In fact, the Marcuccis were not given the opportunity to counter the errors, inconsistencies and inadequacies in the Trial Court's appointed appraiser's appraisal even in a written statement.

The reasoning of the Connecticut Supreme Court applies equally to this case. Without a hearing "where the defendant may present evidence of value and cross-examine the witnesses the defendant is deprived of his essential constitutional right to be heard at a meaningful time, in a meaningful manner; and therefore," the process "cannot pass constitutional scrutiny under the due process clauses of the federal constitution...." *Id.* at 1026. Thus, the highest courts of at least these two States are divided on this critical issue and this Court should grant certiorari to rectify this division.

B. Conflicts with the Missouri Supreme Court's decision in *Conseco Finance Servicing Corp.*

In *Conseco Finance Servicing Corp. v. Missouri Department of Revenue*, 195 S.W.3d 410 (Mo. 2006), the Missouri Supreme Court invalidated on Constitutional due process grounds, a Missouri statute which transferred title to abandoned manufactured homes to the owner of the property on which such homes were located without providing the opportunity of a pre-deprivation hearing to the owner of, or lienholder on, such manufactured home. The court held that, "Further on its face the Act unconstitutionally fails to provide a pre-deprivation hearing...." *Id.* at 77.

In so holding, unlike the Pennsylvania courts, the Missouri Supreme Court applied the procedural due process dictates of this Court and noted that the owners of the manufactured homes "were entitled to a hearing before their property interests were disturbed. Without a pre-deprivation hearing, they were not given an opportunity to be heard at a meaningful time and in a meaningful manner." *Id.* at 103.

The decision of the Pennsylvania courts in the instant case patently conflicts with the decision of the Missouri Supreme Court in *Conseco,* as well as the Connecticut Supreme Court in *Society for Savings* and the procedural due

process precedents of this Court. Thus, the courts are deeply divided on this critical federal question and this Court should grant certiorari to rectify this division.

IV. THE COURT MUST PROVIDE GUIDANCE TO THE PENNSYLVANIA COURTS AND OTHER STATE COURTS AND LEGISLATURES IN THIS CRUCIAL DEFICIENCY JUDGMENT AREA.

The legislation of the States is in disarray on the important federal question of the extent of the Constitutional due process rights to which foreclosed mortgagors are entitled when a deficiency judgment resulting from the forced sale of their property is assessed against them. At least seven States require evidentiary hearings, just like the Pennsylvania Deficiency Judgment Act[4] requirements that were emasculated by the Pennsylvania courts in this case. These States are Arizona, Arkansas, California, Connecticut, North Carolina, Oklahoma and Texas.[5]

At least two States require the court appointed appraiser process which does not permit the appraisers to be cross-examined on their appraisals. This is the specific process that was declared unconstitutional by the Connecticut Supreme Court in *Society for Savings v. Chestnut Estates, Inc.*, 409 A.2d 1020 (Conn. 1979). These States are Louisiana and Maine.[6]

At least ten States leave the deficiency judgment determination entirely to the discretion of their courts. Thus, those courts can decide to have a hearing or not, decide to

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[4] 42 Pa. C.S.A. § 8103 *et. seq.*

[5] Ariz. Rev. Stat. § 12-1566.C and § 33-814.A, Ark. Code Ann. § 18-50-112, Cal. Code, Code of Civil Procedure § 726.(b), Conn. Gen. Stat. § 846-49-14.(a), N.C. Gen. Stat. § 45-21.36, Okla. Stat. § 46-43.A.2d and Tex. Stat., Property Code § 51.003.

[6] La. Rev. Stat. § 13.4106 and § 13.4363 and Maine Rev. Stat., Tit. 14, § 713-6-6324.

take evidence or not; or employ any other process. Those States are Florida, Idaho, Illinois, Iowa, Minnesota, New York, Vermont, Washington, Wisconsin and Wyoming.[7]

At least six States permit the deficiency judgment to be assessed by the court clerk. The court clerk simply subtracts the sales price for the foreclosed property from the debt amount and establishes the deficiency judgment amount as the difference. These States are Hawaii,[8] Michigan, Montana, New Mexico, South Dakota and Utah.[9]

A few States actually combine a hearing with an optional mutually agreed appraisal process under which the appraisers are subject to cross-examination. These States are Nevada, New Jersey and South Carolina.[10] The rest of the States appear to have no relevant legislation on the subject at all.

Thus, it is imperative that this Court provide guidance to Pennsylvania and the other States on the critical due process requirements of the Constitution's Fourteenth Amendment, especially when it involves the deprivation of real property rights, to ensure that this Court's procedural due process precedents are applied for the benefit of the countless millions of foreclosed mortgagors in similar circumstances as the Marcuccis. Absent such guidance, the flouting of the due process principles by the Pennsylvania courts and, potentially, the highest courts and legislatures of other States threatens to undermine this Court's due process framework

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[7] Fla. Stat., Tit. XL, § 702.06, Idaho Code, Tit. 6, Chap. 1, § 6-108, Ill. Comp. Stat., Chap. 770, § 70-16.H, Iowa Code § 654.6, Minn. Stat. § 582.30, N.Y. Consol. Stat., Art. 13, § 1371, Vermont Stat., Tit. 12, § 163-4532.(g), Wash. Rev. Code § 61.12.070, Wis. Stat. & Ann. § 846.04.(1) and § 846.165.(2) and Wyo. Stat. § 34-4-113.(c).

[8] By judicial decree burden is on the mortgagor to show inadequate price.

[9] Mich. Comp. Laws § 600.3150, Mont. Code § 71-1-22.(2), N.M. Stat. § 48-10-17, S.D. Codified Laws § 21-48-14, Utah Code § 78-37-2.

[10] Nev. Rev. Stat. § 40.457, N.J. Perm. Stat., Tit. 2A, § 50-3 and S.C. Code of Laws § 29-3-660 thru § 29-3-750.

as enumerated in *Goldberg v Kelly,* 397 U.S. 254 (1970), *Fuentes v Shevin,* 407 U.S. 67 (1972), *Mathews v. Eldridge,* 424 U.S. 319 (1976), *Connecticut v. Doehr*, 501 U.S. 1 (1991), *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1995) and their progeny. The instant case provides this Court with the perfect opportunity to provide this guidance in the wake of the skyrocketing number of mortgage foreclosures throughout the country. Thus, this Court should grant certiorari.

CONCLUSION

In light of the skyrocketing number of mortgage foreclosures in the United States, the Court's guidance is needed to correct the assault of the Pennsylvania courts' decision in this case upon the Court's procedural due process precedents, before it can work its unconstitutional deprivations on millions of foreclosed mortgagors like the Marcuccis by predatory and other lenders (over 2.2 million by the end of the year alone according to an April 2007 Senate hearing). This Court should grant certiorari to protect the integrity of its procedural due process precedents and rectify the deep division between the decision of the Pennsylvania courts in the instant case and the Constitutionally compliant decisions of other Federal courts and the highest courts of other States, as well as in the relevant legislation of the States. Since it is palpably clear that the Pennsylvania courts have ignored the settled requirements of the Due Process Clause, summary reversal of the judgment is also appropriate under Rule 16.1. See, *e.g., Ponders v. Watson*, 521 U.S. 982 (1997), *Eaton v. City of Tulsa*, 415 U.S. 697 (1974), *Flower v. United States*, 407 U.S. 197 (1972), *Cruz v. Beto*, 405 U.S. 319 (1972). Alternately, the Court should grant plenary review of the judgment of the Pennsylvania courts.

Respectfully submitted.

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May 2007

APPENDIX A

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EXHIBIT A

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 321 WAL 2005

Petition for Allowance of Appeal from the Order of the Superior Court

ESB BANK, SUCCESSOR BY MERGER TO TROY HILL FEDERAL SAVINGS BANK, F/K/A TROY HILL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondent

v.

DONALD R. MARCUCCI AND MARY ELLEN R. MARCUCCI, A/K/A MARY ELLEN RALPH MARCUCCI, HUSBAND AND WIFE,

Petitioners

ORDER

PER CURIAM:

AND NOW, this 16th day of February, 2007, the Petition for Reconsideration is hereby DENIED.

A True Copy John A. Vaskov
As of: February 16, 2007
Attest: /s/ John A. Vaskov
Deputy Prothonotary Supreme Court of Pennsylvania

EXHIBIT B

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

No. 321 WAL 2005

Petition for Allowance of Appeal from the Order of the Superior Court

ESB BANK, SUCCESSOR BY MERGER TO TROY HILL FEDERAL SAVINGS BANK, F/K/A TROY HILL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Respondent

v.

DONALD R. MARCUCCI AND MARY ELLEN R. MARCUCCI, A/K/A MARY ELLEN RALPH MARCUCCI, HUSBAND AND WIFE,

Petitioners

ORDER

PER CURIAM:

AND NOW, this 26th day of July, 2006, the Petition for Allowance of Appeal is hereby DENIED.

A True Copy John A. Vaskov
As of: July 26, 2006
Attest: /s/ John A. Vaskov
Deputy Prothonotary Supreme Court of Pennsylvania

EXHIBIT C

THE SUPERIOR COURT OF PENNSYLVANIA
OFFICE OF THE PROTHONOTARY

June 9, 2005

Donald R. Marcucci, Esquire
12953 Lexington Summit Street
Orlando, FL 32828

IN RE: ESB BANK ETC. V. DONALD R. MARCUCCI ET UX
NO. 263 WDA 12004

Dear Mr. Marcucci:

The Court has entered the following Order on the Application for Reargument filed in the above-captioned matter:

"ORDER OF COURT

The Court hereby DENIES the application filed April 15, 2005, requesting reargument of the decision dated April 1, 2005.

June 9, 2005 **PER CURIAM"**

Very truly yours,
/s/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

ERV/bcc
cc: William G. Merchant, Esquire
Honorable Paul F. Lutty, Jr.,

EXHIBIT D

Non-Precedential Decision – See Superior Court I.O.P. 65.37

IN THE SUPERIOR COURT OF PENNSYLVANIA

No. 263 WDA 2004

ESB BANK, SUCCESSOR BY MERGER TO TROY HILL FEDERAL SAVINGS BANK, f/ka TROY HILL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Appellee

v.

DONALD R. MARCUCCI AND MARY ELLEN R. MARCUCCI, a/k/a MARY ELLEN RALPH MARCUCCI, HUSBAND AND WIFE,

Appellants

Appeal from the Order entered in the Court of Common Pleas of Allegheny County, Civil Division, No(s): 98-6335

BEFORE: HUDOCK, MUSMANNO and TAMILIA, JJ.

MEMORANDUM FILED: April 1, 2005

Mortgagors, Donald R. Marcucci and Mary Ellen R. Marcucci,[1] his wife, appeal, the January 13, 2004 Order entered in this mortgage foreclosure action brought by the appellee, ESB Bank, wherein the fair market value (FMV) of the appellants' house and property was set at $350,000, minus liens totaling $8,843.93.

[1] The appellants technically are preceding *pro se*, but appellant husband, author of the appellants' brief, is an attorney. At the time of this appeal, husband lists his address as Orlando, Florida, and wife is living at the appellants' Weston property.

In May, 1992, appellants obtained financing from appellee bank to construct a new residence. The $500,000 borrowed was secured by a mortgage that encumbered both their current residence on Weston Drive (hereinafter the Weston property), and the residence then under construction located on Heartwood Drive (the Heartwood property).[2] When the appellants defaulted on the loan, mortgage foreclosure proceedings were commenced on or about April 13, 1998. Summary judgment was granted in bank's favor on the Heartwood residence, and partial summary judgment was entered in favor of the appellants on the Weston property. On January 21, 200, judgment for $408,206.04 was entered in favor of the bank for the Heartwood property, which the bank thereafter obtained at sheriff's sale and sold in January 2001 for $310,000. Appellee bank then sought a deficiency judgment.

On July 20, 2001, the partial summary judgment in favor of appellants was overturned by this Court, ***Troy Hill Federal Savings Bank v. Marcucci***, 785 A.2d 1045 (Pa.Super. 2001) (unpublished memorandum), *appeal denied*, 571 Pa. 708, 812, A.2d 1230 (2002), and on February 12, 2003, the trial court granted summary judgment in mortgage foreclosure in favor of the bank on the Weston property.

On March 3, 2003, appellee bank filed a motion to schedule a hearing on its petition to fix the FMV of the Heartwood property. Record No. 44, Motion. On this same

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[2] Appellee bank agreed to loan appellants $375,000 for the purpose of constructing the Heartwood home. When appellants indicated they intended to secure another "swing" loan to be secured by their Weston residence, the bank agreed to loan appellants a total of $500,000 to be secured by the lien of a single mortgage on both properties. Both parcels were subject to foreclosure upon default. ***Troy Hill Federal Savings v. Marcucci***, 785 A.2d 1045 (Pa.Super. 2001) (unpublished memorandum), *appeal denied*, 571 Pa. 708, 812 A.2d 1230 (2002).

day, the court entered an Order directing that all discovery with regard to appellee's petition to fix the FMV shall be concluded within 60 days of the Order, and a hearing would be conducted on June 3, 2003. On June 3, 2003, appellants filed their brief in response to appellee's petition to fix the FMV wherein they detailed their argument as to the appropriate value to be placed on the uncompleted structure. Also, on June 3, 2003, an in-chambers discussion apparently was concluded.

On June 6, 2003, the court appointed Terri Love, an independent real estate appraiser, to determine the value of the Heartwood property as of April 2000. The June 6th Order also directed Love to consider the following factors when inspecting the interior and exterior of the property and calculating the FMV: (1) the cost of completing the construction of the property based on its condition in April 2000; (2) all prior appraisals and offers for sale; (3) the January 2001 sale to the current owner; and (4) all other information submitted to the court by the parties on June 3, 2003. The appraiser was also directed to contact counsel for both parties to arrange for an interior inspection of the property. Record, No. 47, Order. On January 13, 2004, for the purpose of compliance with the Deficiency Judgment Act, 42 Pa.C.S.A. § 8103, **Deficiency judgments**, the court penned the Order assigning a FMV of $350,000, minus liens totaling $8,843.93. This timely appeal followed.[3]

Appellants first argue the court erred by refusing to hold a hearing, as required by the Deficiency Judgment Act, to consider additional evidence concerning the FMV of the Heartwood property. By doing so, appellants argue, the court denied them their right to question the bank's representatives

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[3] A sheriff sale on the Weston property was scheduled for June 7, 2004, but was stayed on May 17, 2004, following a hearing, pending resolution of this appeal.

and the court's expert concerning their calculations, and also precluded them from presenting their evidence on the FMV and the accuracy and propriety of the liens and judgments against the property. The court, appellants argue, limited evidence on FMV to that of its own appointed expert.

> The scope of review of this issue is, of course, limited to a determination of whether there is sufficient evidence to sustain the holding of the hearing judge, or whether the court committed reversible error of law. Although the Deficiency Judgment Act does not define the term "fair market value", the appellate courts of the Commonwealth, when called upon to apply judicial scrutiny to fair market value from other perspectives, have defined the term as the price a purchaser, willing but not obligated to buy, would pay an owner, willing but not obligated to sell. This formula must, of course, be tempered by recognition that, in instances arising under the Deficiency Judgment Act, "the actual situation is that of a 'purchaser' obliged to buy in, in order to protect the loan it made, and an 'owner' obliged to sell his property at Sheriff's sale, because he is unable to pay his debt" and, therefore, the hearing court must consider "what reasonably the judgment creditor can get out of the property in partial or complete recapture of the loan and interest on loan.

First Pa. Bank, N.A., v. Peace Valley Lakeside, 47A A.2d 42, 43-44 (Pa.Super. 1984) (citations omitted).

> In arriving at a fair market value, courts should consider recent sales of realty of comparable location and description, uses to which the realty is adapted and might reasonably be applied,

> demand for realty, and income produced by it, and all elements which might affect its value.
>
> Additionally, the trier of fact weighs the credibility of an expert witness's testimony regarding valuation. An appellate court must accept the creditability determinations of the trial court with respect to the credibility of witnesses.

Confederate Life Insurance Properties v. Morrisville Properties, L.P., and Site Development, Inc., 715, A.2d 1147, 1154 (Pa.Super. 1998) (quotations and citations omitted).

Our reading of the Deficiency Judgment Act reveals no directive that a hearing is required in order to determine the FMV of property. While admittedly, as argued by appellants, there is reference to "hearings" in the Act, there is no mandate that one be conducted prior to fixing the FMV. That being said, the certified record, briefs and reproduced records available for our consideration indicate the parties did indeed meet in the trial judge's chambers prior to the execution of the June 6, 2003 Order that directed, in great detail, what was required to be considered by the assigned real estate appraiser. Appellants admit they provided input to that Order, although it is now counsel's contention their input was coerced, given only in an effort to protect their clients in light of the trial court's alleged refusal to conduct an evidentiary hearing. There is no evidence of record, however, that appellants objected to the court's refusal.

Contrary to appellant's argument, they were provided the opportunity to counter information provided by the appellee relative to the FMV. In compliance with the court's Order of March 3, 2003 directing that discovery be completed by June 3, 2003, appellants prepared and submitted a thorough, extensive and detailed brief in reply to the petition to fix the

FMV. Record, No. 46 Defendants' Brief. Therein appellants challenged the bank's suggested FMV of $315,000, and offered evidence to support their belief the FMV at the time of the April, 2000 sheriff sale was $425,000.

The trial court, sitting as the trier of fact, considered all information provided by the parties and the appraiser before rendering its decision fixing the FMV at $350,000, minus the $8,843.93 liens.

> In reaching this conclusion, this Court took all of the Defendants['] reasons complained of [on appeal] into consideration, as this Court considered the independent appraisal report, all of the prior appraisal reports (including the Defendants' appraisal), prior offers for Sale, the January 2001 Sale to the current owner, and all other information which was submitted to the Court by each of the parties on June 3, 2003. Furthermore, although Defendants alleged that additional hearings were needed for this Court to accurately determine the fair market value, additional hearings would simply have been a reiteration of the facts, evidence, and appraisals that this Court fully considered when fixing the fair market value at $350,000.

Trial Court Opinion, Lutty, J., 3/23/04 at 3.

We find no basis upon which to conclude the trial court abused its discretion by assessing the FMV at $350,000. The court considered the information gathered by the appraiser at its directive and found it reliable, convincing and credible. ***See Confederate Life Insurance Properties, supra.*** It did not rely solely on the information gathered by the licensed appraiser, as appellants content, but also considered the evidence presented by each party.

Appellants next argue that the trial court erred by reducing the FMV "by an amount of $8,843.93 for mostly erroneous liens, that were gratuitously paid by [appellee]". Appellants' brief at 22.

> [A]ppellee alleged, and continues to allege, that the bulk of these liens were for Upper St. Clair Township and School District taxes on the Heartwood Property and Lot. However, as [appellee] knows, $8,231.68 of these alleged liens were erroneous wage tax liens that, even if valid, would have been discharged by the Sheriff's sale. And, under the Deficiency Judgment Act, 42 Pa.C.S.A. §8103 [(c) (3)], the Trial Court can only reduce its determined fair market value by "the amount of all prior liens, costs, taxes and municipal claims not discharged by the sale.["] In this case, that is at most $564.35, not the $8,843.93 amount used by the Trial Court. The records of the Sheriff's sale of the Heartwood Property and Lot maintained by the Allegheny County Treasurer's office indicate that there were no tax liens against the Heartwood Property and Lot at the time of the Sheriff's sale. Thus, the payment of the alleged tax liens by [appellee] was clear gratuitous.

Id. at 22-23 (citations omitted).

Appellee replies that its bid at the sheriff's sale was only for $1,180 to cover the costs of effectuating the sale of the new residence to a third party. Appellee further replies, and we agree, that appellants have produced no evidence to substantiate their claim that the amount charged was primarily unpaid wage taxes as alleged, discharged by the sheriff's sale. To support its argument, appellee has

provided this Court with a copy of a statement generated by Jordan Tax Service and produced by the Allegheny County Treasurer's office indicating that as of April, 2000, the township and school district taxes owned by appellants on the Heartwood property amounted to $8,231.68. Appellees are under no obligation to inquire into a possible alternative origin of the monies owned and indicated on the tax certification. Per the document, the balance of $8,843.93 deducted from the FMV went to satisfy the 1997 township and school district tax ($512.50), sewer rental ($65.65) and 2000 township tax ($36.40). In appellants' brief filed in response to appellee's petition to fix the FMV, they alleged they had tax receipts to prove they had paid township and school district taxes from 1993 through 1999, with minor exceptions; they failed, however, to produce any such documentation. Without evidence to counter the Jordan Tax Service statement,[4] we are constrained to find appellants have failed to prove their claim, and there was no error by the trial court in deducting the $8,843.93 from the FMV of $350,000.

Appellants' next claim is the trial court erred by failing to correct errors in the January 21, 2000, $408,206.04 judgment entered in favor of appellee for the Heartwood property, and, later, the Weston property. Without discussion, the time for challenging the entry of this judgment relative the Heartwood property has long passed. Sheriff sale and appellant's petition to strike or open judgment relative to the Weston property has been stayed, by Order dated May 17, 2004, pending resolution of this appeal.

Finally, appellants raise 13 instances of what they term "gross inequities," and ask that the court "exercise its

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[4] We acknowledge that this document does not appear in the certified record, at least appellee fails to provide any citation thereto, nevertheless, the document serves to counter the unsubstantiated claim by appellants.

equity powers to rectify these inequities and bring this matter to a merciful conclusion by dismissing the [bank's] deficiency claims and actions." Appellants' brief at 26. A summary of the "inequities" follows. Appellants argue it was unfair for the appellee bank to lure them into executing a construction loan agreement and mortgage, accept payments from them in excess of $365,000, and (1) argue the property was worth less than that amount; and (2) sell the property in 1999 for $425,000, acquire the property at sheriff sale for $1,180, sell it in 2001 for $310,000, at a commercially unreasonable price, holding appellants responsible for the balance. There is also no equity in (1) telling the IRS it (bank) forgave the debt and then filing a deficiency action; (2) paying the liens that would have been discharged by a sheriff's sale; (3) filing a praecipe for an excessive judgment (the January 21, 2000 judgment); (4) delaying for 29 months its prosecution for a deficiency judgment; (5) twice recording the debt on appellants' credit reports at two separate banks and credit reporting agencies ($375,000 and $500,000); and (6) continuing to assess an interest rate of 8.75% rather than a post-judgment rate of 6.0%. Lastly, appellants contend appellee, in its 1999 amended brief seeking summary judgment, intentionally misrepresented that the properties were being used commercially in order to unjustly influence the court's decision.

Appellant's last comprehensive argument challenges the fairness of the foreclosure and deficiency judgment proceedings. However unfortunate it is to lose an investment, it comes as a result of a default on one's obligation to satisfy a legal obligation. Here, appellants defaulted on the loan(s) they were given in order to build their new home. They offered as security for the half million dollars ($500,000) loaned, the home in which they were living and the home under construction. The appellee bank

is entirely justified, legally and morally, in taking action to recover monies lost.

Appellee addresses each of the appellants' claims of inequitable treatment. This Court, however, elects not to respond to each alleged injustice raised, as they are beyond our scope of review; that being whether the evidence presented was sufficient to sustain the trial court's finding the FMV of the Heartwood property was $350,000 minus $8,843.93 in liens, and whether the trial court committed reversible error. We find the evidence was sufficient and there was no error.

Order Affirmed.

Judgment Entered:

/s/ Eleanor R. Valecko
Deputy Prothonotary

DATE: April 1, 2005

EXHIBIT E

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

Case No. GD 98-6335

Code: 140

ESB BANK, SUCCESSORY BY MERGER TO TROY HILL FEDERAL SAVINGS BANK, f/k/a TROY HILL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Plaintiff/Petitioner,

vs.

DONALD R. MARCUCCI and MARY ELLEN R. MARCUCCI, a/k/a MARY ELLEN RALPH MARCUCCI, husband and wife,

Defendants/Respondents.

OPINION

By:

The Honorable Paul F. Lutty, Jr.

Copies sent to:

Robert Murphy, Esquire
Papernick & Gefsky, PC
One Oxford Center
34th Floor
Pittsburgh, PA 15219

Donald R. Marcucci
12953 Lexington Summit Street

Orlando, FL 32828

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

Case No. GD 98-6335

Code: 140

ESB BANK, SUCCESSORY BY MERGER TO TROY HILL FEDERAL SAVINGS BANK, f/k/a TROY HILL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Plaintiff/Petitioner,

vs.

DONALD R. MARCUCCI and MARY ELLEN R. MARCUCCI, a/k/a MARY ELLEN RALPH MARCUCCI, husband and wife,

Defendants/Respondents.

OPINION

Defendants appeal from an order of Court dated January 13, 2004 wherein this Court entered an order establishing the fair market value of the Property for the purpose of compliance with the Deficiency Judgment Act 42 Pa. C.S.A. 8103, to be a value of $350,000.00 less the amount of the Prior liens on said premises fixed at $8,843.93. Defendants allege numerous claims of error in their Concise Statement of Matters Complained of on Appeal, all of which lack merit.

FACTUAL BACKGROUND

This Court appointed an independent real estate appraiser to determine the fair market value of the Property, located at 2544 Heartwood Drive, Pittsburgh, Pa., as of April of 2000.

This Court appointed Terri Love as the independent appraiser.

In determining the fair market value, Ms. Love took into account the cost of completing the construction of the Property, based on the condition of the Property in April of 2000. Additionally, in determining the fair market value of the Property, Ms. Love inspected the Property and considered all of the prior appraisal reports, offers for Sale, the January, 2001 Sale to the current owner, and all other information which was submitted to the Court by each of the parties on June 3rd, 2003. Ms. Love also conducted an interior inspection of the Property. The cost of the appraisal was divided equally between the two parties and a report was submitted to the Court.

CONCLUSION

Upon completion of the independent appraisal and report, this Court entered an Order establishing the fair market value of the Property to be a value of $350,000, less the amount of the Prior liens on said premises fixed at $8,843.93. In reaching this conclusion, this Court took all of the Defendants reasons complained of into consideration, as this Court considered the independent appraiser report, all of the prior appraisal reports (including the Defendants' appraisal), prior offers for Sale, the January 2001 Sale to the current owner, and all other information which was submitted to the Court by each of the parties on June 3, 2003. Furthermore, although Defendants allege that additional hearings were needed for this Court to accurately determine the fair market value, additional hearings would simply have been a reiteration of the facts, evidence, and appraisals that this Court fully considered when fixing the fair market value at $350,000.

Accordingly, for the reasons set for above, this Court's Order dated January 13, 2004 should be affirmed.

BY THE COURT:
/s/ Paul F. Lutty, Jr.
Honorable Paul F. Lutty, Jr.

March 23, 2004

EXHIBIT F

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

Case No.: GD 98-6335

Code: 140

ESB BANK, SUCCESSORY BY MERGER TO TROY HILL FEDERAL SAVINGS BANK, f/k/a TROY HILL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Plaintiff/Petitioner

vs.

DONALD R. MARCUCCI and MARY ELLEN R. MARCUCCI, a/k/a MARY ELLEN RALPH MARCUCCI, husband and wife,

Defendants/Respondents

ORDER OF COURT

CIVIL DIVISION

Case No.: GD 98-6335

Code: 140

ESB BANK, SUCCESSORY BY MERGER TO TROY HILL FEDERAL SAVINGS BANK, f/k/a TROY HILL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Plaintiff/Petitioner

vs.

DONALD R. MARCUCCI and MARY ELLEN R. MARCUCCI, a/k/a MARY ELLEN RALPH MARCUCCI, husband and wife,

Defendants/Respondents

ORDER FOR RECONSIDERATION

AND NOW, this 17th day of Feb., 2004 upon consideration of the foregoing petition, PETITION DENIED.

BY THE COURT:
/s/ Paul F. Lutty, Jr.

EXHIBIT G

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

GD 98-6335

TROY HILL FEDERAL SAVINGS BANK, f/k/a TROY HILL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

vs.

DONALD R. MARCUCCI and MARY ELLEN R. MARCUCCI, a/k/a MARY ELLEN RALPH MARCUCCI, husband and wife,

Defendants.

ORDER OF COURT

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA CIVIL DIVISION

Case No.: G.D. 98-6335

TROY HILL FEDERAL SAVINGS BANK, f/k/a TROY HILL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

vs.

DONALD R. MARCUCCI and MARY ELLEN R. MARCUCCI, a/k/a MARY ELLEN RALPH MARCUCCI, husband and wife,

Defendants.

ORDER OF COURT

AND NOW, this 13th day of Jan., 2004 with regard to the Plaintiff's Petition to Fix Fair Market Value in the above captioned matter, it is hereby ORDERED, ADJUDGED, and DECREED that the fair market value of the premises located at 2544 Heartwood Drive, Pittsburgh, Pennsylvania, for the purposes of compliance with the Deficiency Judgement Act, 42 Pa.C.S.A.§ 8103 is fixed at the value of $350,000.00, less the amount of the Prior liens on said premises fixed at $8,843.93.

BY THE COURT:
/s/ Paul F. Lutty, Jr.
(J)

EXHIBIT H

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA CIVIL DIVISION

Case No.: GD 98-6335

TROY HILL FEDERAL SAVINGS BANK, f/k/a TROY HILL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Plaintiff,

vs.

DONALD R. MARCUCCI and MARY ELLEN R. MARCUCCI, a/k/a MARY ELLEN RALPH MARCUCCI, husband and wife,

Defendants.

ORDER OF COURT

AND NOW, to-wit, this 6th day of June, 2003, with regard to the Plaintiff's Petition to Fix Fair Market Value in the above captioned matter, it is hereby ORDERED, ADJUDGED, and DECREED that:

1. Within 20 days of this Order, the Court will hereby appoint an independent real estate appraiser to determine the fair market value of the Property located at 2544 Heartwood Drive, Pittsburgh, Pennsylvania, as of April of 2000. The Court appoints Terri Love of Kulzer & Co. Inc. as such appraiser.

2. In determining the fair market value, said appraiser will take into account the cost completing the construction of the Property based on the condition of the Property in April of 2000.

3. In determining the fair market value of the Property, the appraiser will inspect the Property and will also consider all of the prior appraisal reports, offers for sale, the January 2001 sale to the current owner and all other information which was submitted to the Court by each of the parties on June 3rd, 2003.

4. The appraiser will contact counsel for both parties to arrange for an interior inspection of the property. If the owners, H. Michael and Patrice Y. Fackenthal, refuse to allow access to the property for inspection, the Court will enter an Order compelling the owner to allow access for the inspection.

5. Upon completion of the appraisal, this Court will enter an order establishing the fair market value of the property based on the results of said appraisal.

6. The cost of the appraisal will be divided equally between the two parties.

BY THE COURT:
/s/ Paul F. Lutty, Jr.

EXHIBIT I

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

Case No.: GD 98-6335

Code: 140

ESB BANK, SUCCESSORY BY MERGER TO TROY HILL FEDERAL SAVINGS BANK, f/k/a TROY HILL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Plaintiff/Petitioner

vs.

DONALD R. MARCUCCI and MARY ELLEN R. MARCUCCI, a/k/a MARY ELLEN RALPH MARCUCCI, husband and wife,

Defendants/Respondents

PETITION FOR RECONSIDERATION OF COURT'S ORDER IN PETITION TO FIX FAIR MARKET VALUE

FILED ON BEHALF OF:

Donald R. Marcucci and Mary Ellen R. Marcucci, a/k/a Mary Ellen Ralph Marcucci, Defendants/Respondents

COUNSEL FOR THIS PARTY:

Donald R. Marcucci, Esquire
PA I.D. #21944

12061 Lake Cypress Circle
Apt. 207
Orlando, FL 32828 Until 2/29/04
(407) 736-5824

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2313 Weston Drive
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IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

CIVIL DIVISION

Case No.: GD 98-6335

Code: 140

ESB BANK, SUCCESSORY BY MERGER TO TROY HILL FEDERAL SAVINGS BANK, f/k/a TROY HILL FEDERAL SAVINGS AND LOAN ASSOCIATION,

Plaintiff/Petitioner

vs.

DONALD R. MARCUCCI and MARY ELLEN R. MARCUCCI, a/k/a MARY ELLEN RALPH MARCUCCI, husband and wife,

Defendants/Respondents

PETITION FOR RECONSIDERATION

Defendants/Respondents, Donald R. Marcucci and Mary Ellen R. Marcucci, a/k/a Mary Ellen Ralph Marcucci, hereby respectfully request this Honorable Court to reconsider its January 13, 2004 Order on the Petition to Fix Fair Market Value, to hold the required hearing in this matter and thereafter fully consider all of the testimony and other evidence, presented during such hearing, for the following reasons:

1. The Court's failure to conduct a hearing on the Plaintiffs'/Petitioner's Petition To Fix Fair Market value denied the Defendants'/Respondents' due process rights to:

(a) Examine the Plaintiff's/Petitioner's representatives on the relevancy of its original $610,000.00 appraisal of the to be completed Heartwood Property, before there was any matter in controversy between the Plaintiff/Petitioner and the Defendants/ Respondents;

(b) Examine the Plaintiff's/Petitioner's representatives on the propriety of the Bank approving and making payments to the builder of the Heartwood residence of at least $365,000 for its construction upon an $80,000 purchased by Defendants/ Respondents, a total of cost of at least $446,000, if the fair market value of the property was only $315,000 as alleged by the Plaintiff/Petitioner;

(c) Examine the Plaintiff's/Petitioner's expert on his unconventional, unorthodox and unsupported reduction in his appraisal amount by $100,000 as an allowance for profit that a Purchaser of the uncompleted property would allegedly expect to make for his efforts;

(d) Examine the Plaintiff's/Petitioner's expert on the reduction in his appraisal Amount by an unsupported estimate of $200,000 to complete the Heartwood residence;

(e) Examine the Plaintiff's/Petitioner's representatives on the difference between the Bank's expert's cost to complete the Heartwood property and Troy Hill's former president's deposition testimony on the cost to complete the Heartwood residence;

(f) Examine the Plaintiff's/Petitioner's expert on the appropriateness of the comparable sales used in his appraisal of the Heartwood property;

(g) Examine the Plaintiff's/Petitioner's expert on the appropriateness of the sales comparison approach as opposed to the cost approach for valuing uncompleted residential property;

(h) Examine the Plaintiff's/Petitioner's expert on the inflationary effects on the on the value of residential property in Upper St. Clair, Pennsylvania (the location of the Heartwood property) between April 1994 and April 2000;

(i) Examine the Court appointed appraiser on the square footage, missing bathroom and other apparent errors in her appraisal of the Heartwood residence;

(j) Examine the Court's appointed expert on the appropriateness of the comparable sales used in her appraisal of the Heartwood property;

(k) Examine the Court's appointed expert on the appropriateness of the sales comparison approach as opposed to the cost approach for valuing uncompleted residential property;

(l) Examine the Plaintiff's/Petitioner's expert on the inflationary effects on the value of residential property in Upper St. Clair, Pennsylvania (the location of the Heartwood property) between April 1994 and April 2000;

(m) Present testimony on the appropriateness of the cost approach for valuing uncompleted property as opposed to the sales comparison approach which requires the use of subjective adjustments;

(n) Present testimony on the preference of the cost approach for valuing uncompleted property;

(o) Present testimony on the over $510,000 cost expended on the Heartwood property;

(p) Present testimony on the unique features of the Heartwood residence which would add to its value if known by the appraisers;

(q) Examine the experts for the parties and the Court on the value of the unique features of the Heartwood residence;

(r) Examine the experts for the parties and the Court on the appropriateness of reductions in the appraised value of the Heartwood property based upon its proximity to U.S. Route 19 in Upper St. Clair Township;

(s) Present evidence on the effect of proximity to U.S. Route 19 on the valuation of other properties in Upper St. Clair Township;

(t) Present testimony on the offers received by Defendants/Respondents to purchase the Heartwood property in the fall of 1999, including the $425,000 Isner offer;

(u) Examine the Plaintiff's/Petitioner's representatives on why the Bank refused to permit the Defendants/Respondents to accept such offers to purchase the Heartwood property;

(v) Examine the Plaintiff's/Petitioner's representatives on the commercial reasonableness of the Bank's efforts to sell, and its sale of, the Heartwood property; and

(w) Present testimony and evidence on the erroneous liens against the Heartwood Property.

2. The Court's failure to conduct a hearing on the Plaintiffs'/Petitioner's Petition To Fix Fair Market Value violates the requirements of the Deficiency Judgement Act (42 Pa. C.S.A. § 8103) which provides in part:

(a) In subsection (c)(4), that "the court shall **hear** the evidence of and determine and fix the fair market value of the property sold." and

(b) In subsection (c)(5), that "After the **hearing**, ... the debtor ... shall be released and discharged of such liability to the judgement creditor to the extent of the fair market value of the property ... less the amount of all prior liens, costs, taxes, and municipal claims not discharged by the sale ..." Emphasis added.

3. The Court's failure to conduct a hearing on the Plaintiffs'/Petitioner's Petition To Fix Fair Market Value violates the dictates of Pennsylvania law since it in effect limited the evidence of the fair market value to that obtained from experts when under Pennsylvania law such evidence is not the exclusive method for establishing a property's fair market value for purposes of the Deficiency Judgement Act (42 Pa. C.S.A. § 8103).

4. The Court's Order, reducing the Fair Market Value of the Heartwood property for mostly erroneous liens that were gratuitously paid by the Plaintiff/Petitioner, violates the requirements of the Deficiency Judgement Act (42 Pa. C.S.A. § 8103) which provides in part:

(a) In subsection (c)(5), that "After the hearing, ... the debtor ... shall be released and discharged of

such liability to the judgement creditor to the extent of the fair market value of the property ... less the amount of all prior **liens**, costs, taxes, and municipal claims **not discharged by the sale** ..." The majority of the liens in question, even if valid, were not real estate tax liens and would have been discharged by the sheriffs sale of the Heartwood property if they had not been paid by the Plaintiff/Petitioner. Emphasis added.

5. The Court's Order, reducing the Fair Market Value of the Heartwood property for mostly erroneous liens that were gratuitously paid by the Plaintiff/Petitioner, violates general legal dictates of Pennsylvania law. If the alleged liens were for real estate taxes, they are by statute a first lien on the real estate and not discharged by the Sheriff's sale of the property. However, except for approximately $600.00 of the alleged $8, 843.93 in liens against the Heartwood property, the liens were erroneous local wage tax liens that, even if valid, would have been discharged by the Sheriff's sale of the property and should not have been paid by the Plaintiff/Petitioner or used to reduce the value of the Heartwood property.

WHEREFORE, the Defendants/Respondents respectively request that this Honorable Court reconsider its January 13, 2004 Order in this matter, hold a hearing to fully hear and consider all of the evidence and find that the Fair Market Value of the Heartwood property is at least $425,000 less only the prior valid real estate tax liens of approximately $600.00 that would not have been discharged by the Sheriff's sale of the property.

RESPECTFULLY SUBMITTED:

/s/ Donald R. Marcucci

Donald R. Marcucci, Esquire
For Defendants/respondents

12061 Lake Cypress Circle
Apt. 207
Orlando, FL 32828 Until 2/29/04
(407) 736-5824

12953 Lexington Summit Street
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2313 Weston Drive
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CIVIL DIVISION

Case No.: GD 98-6335

Code: 140

ESB BANK, SUCCESSSOR BY MEGER TO TROY HILL FEDERAL SAVINGS BANK, f/k/a TROY HILL FEDERAL SAVINGS AND LOAN ASSOCIATION

Plaintiff/Petitioner

vs.

DONALD R. MARCUCCI and MARY ELLEN R. MARCUCCI, a/k/a MARY ELLEN RALPH MARCUCCI, husband and wife,

Defendants/Respondents

ORDER FOR RECONSIDERATION

AND NOW, this _____ day of _____, 2004 upon consideration of the foregoing Petition, it is hereby ordered that the Court's January 13, 2004 Order is withdrawn and will be reconsidered by the Court after an appropriate hearing on the Plaintiff's/Petitioner's Petition To Fix The Fair Market Value.

BY THE COURT:

_____

EXHIBIT J

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2.

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for President and Vice-President of the United States, Representatives of Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3.

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office,

civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4.

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5.

The Congress shall have the power to enforce, by appropriate legislation, the provision of this article.

EXHIBIT K

42 Pa.C.S.A. § 8103. Deficiency Judgments

(a) General rule. — Whenever any real property is sold, directly or indirectly, to the judgment creditor in execution proceedings and the price for which such property has been sold is not sufficient to satisfy the amount of the judgment, interest and costs and the judgment creditor seeks to collect the balance due on said judgment, interest and costs, the judgment creditor shall petition the court to fix the fair market value of the real property sold. The petition shall be filed as a supplementary proceeding in the matter in which the judgment was entered.

(b) Effect of failure to give notice. — Any debtor, obligor, guarantor, mortgagor, and any other person directly or indirectly liable to the judgment creditor for the payment of the debt, and any owner of the property affected thereby, who is neither named in the petition nor served with a copy thereof or notice of the filing thereof as prescribed by general rule, shall be deemed to be discharged from all personal liability to the judgment creditor on the debt, interest and costs, but any such failure to name such person in the petition or to serve the petition or notice of the filing thereof shall not prevent proceedings against any respondent named and served.

(c) Action on petition. —

(1) If no answer is filed within the time prescribed by general rule, or if an answer is filed which does not controvert the allegation of the fair market value of the property as averred in the petition, the court shall determine and fix as the fair market value of the property sold the amount thereof alleged in the petition to be the fair market value.

(2) If an answer is filed controverting the averment in the petition as to the fair market value of the property, but no testimony is produced at the hearing supporting such denial of the fair market value, the court shall determine and fix as the fair market value of the property sold the amount thereof alleged in the petition to be the fair market value.

(3) If an answer is filed alleging as the fair market value an amount in excess of the fair market value of the property as averred in the petition, the judgment creditor may agree to accept as the fair market value of the property the value set up in the answer and in such case may file a stipulation releasing the debtors, obligors and guarantors, and any other persons liable directly or indirectly for the debt, and the owners of the property affected thereby, from personal liability to the judgment creditor to the extent of the fair market value as averred in the answer, less the amount of any prior liens, costs, taxes and municipal claims not discharged by the sale, and also less the amount of any such items paid at distribution on the sale.

(4) If an answer is filed and testimony produced setting forth that the fair market value of the property is more than the value stated in the petition, the court shall hear evidence of and determine and fix the fair market value of the property sold.

(5) After the hearing, if any, and the determination by the court under paragraph (1), (2) or (4) of the fair market value of the property sold, then, except as otherwise provided in subsection (f), the debtor, obligor, guarantor and any other person liable directly or indirectly to the judgment creditor for the payment of the debt shall be released and discharged of such liability to the judgment creditor to the extent of the fair market value of said

property determined by the court, less the amount of all prior liens, costs, taxes and municipal claims not discharged by the sale, and also less the amount of any such items paid at the distribution on the sale, and shall also be released and discharged of such liability to the extent of any amount by which the sale price, less such prior liens, costs, taxes and municipal claims, exceeds the fair market value as agreed to by the judgment creditor or fixed and determined by the court as provided in this subsection, and thereupon the judgment creditor may proceed by appropriate proceedings to collect the balance of the debt.

(d) Action in absence of petition. — If the judgment creditor shall fail to present a petition to fix the fair market value of the real property sold within the time after the sale of such real property provided by section 5522 (relating to six months limitation), the debtor, obligor, guarantor or any other person liable directly or indirectly to the judgment creditor for the payment of the debt, or any person interested in any real estate which would, except for the provisions of this section, be bound by the judgment, may file a petition, as a supplementary proceeding in the matter in which the judgment was entered, in the court having jurisdiction, setting forth the fact of the sale, and that no petition has been filed within the time limited by section 5522 to fix the fair market value of the property sold, whereupon the court, after notice as prescribed by general rule, and being satisfied of such facts, shall direct the clerk to mark the judgment satisfied, released and discharged.

(e) Waiver of benefit of section prohibited. — Any agreement made by any debtor, obligor, surety or guarantor at any time, either before or after or at the time of incurring any obligation, to waive the benefits of this

section or to release any obligee from compliance with the provisions hereof shall be void.

(f) Certain special allocations. — Notwithstanding the provisions of subsection (c)(5), if the judgment creditor is a nonconsumer judgment creditor and:

(1) if the judgment has been entered with respect to a partial recourse obligation, the fair market value of the property, determined as provided in subsection (c) will be applied first to discharge, as provided in subsection (c)(5), all liability for the nonrecourse portion of the obligation before any portion of such value is applied to discharge any liability for the recourse portion of the obligation; and

(2) if the judgment has been entered with respect to an obligation of which only a portion is guaranteed, the fair market value of the property determined as provided in subsection (c) will be applied first to discharge, as provided in subsection (c), all liability for the portion of the obligation which is not guaranteed before any portion of such value is applied to discharge any liability for the portion of such obligation which is guaranteed.

(g) Definitions. — As used in this section, the following words and phrases shall have the meanings given to them in this subsection:

"Consumer credit transaction." A credit transaction in which the party to whom credit is offered or extended is a natural person and the money, property or services which are the subject of the transaction are primarily for personal, family or household purposes.

"Judgment." The judgment which was enforced by the execution proceedings referred to in subsection (a),

whether that judgment is a judgment in personam such as a judgment requiring the payment of money or a judgment de terris or in rem such as a judgment entered in an action of mortgage foreclosure or a judgment entered in an action or proceeding upon a mechanic's lien, a municipal claim, a tax lien or a charge on land.

"Judgment creditor." The holder of the judgment which was enforced by the execution proceedings.

"Nonconsumer judgment creditor." Any judgment creditor except a judgment creditor whose judgment was entered with respect to a consumer credit transaction.

"Nonrecourse portion of the obligation." The portion as to which the judgment creditor's recourse is limited to the mortgaged property or other specified assets of the debtor which are less than all of such assets.

"Partial recourse obligation." An obligation which includes both a nonrecourse portion and a recourse portion.

"Recourse portion of the obligation." All of the obligation except the nonrecourse portion thereof.

EXHIBIT L

Various State Deficiency Statutes.

Arizona Revised Statutes

§ 12-1566. C

Any judgment debtor against whom a judgment has been entered pursuant to section 33-725 or 33-814 may, not later than thirty days after sale of the real property, file a written application with the court for determination of the fair market value of the real property which has been sold. Notice of filing the application and of the hearing shall be given to all parties to the action. The fair market value shall be determined by the court at a priority hearing which shall be held upon such evidence as the court may allow. The court shall issue an order crediting the amount due on the judgment with the greater of the sales price or the fair market value of the real property. Fair market value shall mean the most probable price, as of the date of the execution sale, in cash, or in terms equivalent to cash, or in other precisely revealed terms, after deduction of prior liens and encumbrances with interest to the date of sale, for which the real property or interest therein would sell after reasonable exposure in the market under conditions requisite to a fair sale, with the buyer and seller each acting prudently, knowledgeably and for self-interest, and assuming that neither is under duress. If an application has been filed, there shall be no right to redemption as to the real property sold as provided in sections 12-1281, 12-1282 and 12-1283, except creditors having a junior lien to the lien foreclosed may redeem by five day successive periods as provided in section 12-1282, subsection C, commencing sixty days after the sale of the real property. The redemption price shall be calculated on the sales price of the real property.

§ 33-814. A

Except as provided in subsections F and G of this section, within ninety days after the date of sale of trust property under a trust deed pursuant to section 33-807, an action may be maintained to recover a deficiency judgment against any person directly, indirectly or contingently liable on the contract for which the trust deed was given as security including any guarantor of or surety for the contract and any partner of a trustor or other obligor which is a partnership. In any such action against such a person, the deficiency judgment shall be for an amount equal to the sum of the total amount owed the beneficiary as of the date of the sale, as determined by the court less the fair market value of the trust property on the date of the sale as determined by the court or the sale price at the trustee's sale, whichever is higher. A written application for determination of the fair market value of the real property may be filed by a judgment debtor with the court in the action for a deficiency judgment or in any other action on the contract which has been maintained. Notice of the filing of an application and the hearing shall be given to all parties to the action. The fair market value shall be determined by the court at a priority hearing upon such evidence as the court may allow. The court shall issue an order crediting the amount due on the judgment with the greater of the sales price or the fair market value of the real property. "Fair market value" shall mean the most probable price, as of the date of the execution sale, in cash, or in terms equivalent to cash, or in other precisely revealed terms, after deduction of prior liens and encumbrances with interest to the date of sale, for which the real property or interest therein would sell after reasonable exposure in the market under conditions requisite to fair sale, with the buyer and seller each acting prudently, knowledgeably and for self-interest, and assuming that neither is under duress. Any deficiency judgment recovered shall include interest on the amount of the deficiency from the date of the sale at the rate provided in the deed of trust or

in any of the contracts evidencing the debt, together with any costs and disbursements of the action.

Arkansas Code

§ 18-50-112

(a)(1) At any time within twelve (12) months after a sale under this chapter, a money judgment may be sought for the balance due upon the obligation for which a mortgage or deed of trust was given as security.

(2) In such action, the plaintiff shall set forth in his or her complaint, and shall have the burden of proving, the entire amount of indebtedness which was secured by the mortgage or deed of trust, the amount for which the trust property was sold, and the fair market value of the trust property at the date of sale, together with interest from the date of sale, costs, and attorney's fees.

(b) Judgment shall not exceed the lesser of the following:

(1) The amount for which the indebtedness due at the date of sale, with interest from the date of sale, costs, and trustee's and attorney's fees, exceeds the fair market value of the trust property; or

(2) The amount for which the indebtedness due at the date of sale, with interest from the date of sale, costs, and trustee's and attorney's fees, exceeds the amount for which the trust property was sold.

California Code

Code of Civil Procedure, § 726. (b)

The decree for the foreclosure of a mortgage or deed of trust secured by real property or estate for years therein shall declare the amount of the indebtedness or right so secured and, unless judgment for any deficiency there may be between the sale price and the amount due with costs is waived by the judgment creditor or a deficiency judgment is prohibited by Section 580b, shall determine the personal

liability of any defendant for the payment of the debt secured by the mortgage or deed of trust and shall name the defendants against whom a deficiency judgment may be ordered following the proceedings prescribed in this section. In the event of waiver, or if the prohibition of Section 580b is applicable, the decree shall so declare and there shall be no judgment for a deficiency. In the event that a deficiency is not waived or prohibited and it is decreed that any defendant is personally liable for the debt, then upon application of the plaintiff filed at any time within three months of the date of the foreclosure sale and after a hearing thereon at which the court shall take evidence and at which hearing either party may present evidence as to the fair value of the real property or estate for years therein sold as of the date of sale, the court shall render a money judgment against the defendant or defendants for the amount by which the amount of the indebtedness with interest and costs of levy and sale and of action exceeds the fair value of the real property or estate for years therein sold as of the date of sale. In no event shall the amount of the judgment, exclusive of interest from the date of sale and of costs exceed the difference between the amount for which the real property or estate for years therein was sold and the entire amount of the indebtedness secured by the mortgage or deed of trust. Notice of the hearing shall be served upon all defendants who have appeared in the action and against whom a deficiency judgment is sought, or upon their attorneys of record, at least 15 days before the date set for the hearing. Upon application of any party made at least 10 days before the date set for the hearing the court shall, and upon its own motion the court at any time may, appoint one of the probate referees provided for by law to appraise the real property or estate for years therein sold as of the time of sale. The probate referee shall file the appraisal with the clerk and the appraisal is admissible in evidence. The probate referee shall take and subscribe an oath to be attached to the appraisal that the referee has truly, honestly

and impartially appraised the real property or estate for years therein to the best of the referee's knowledge and ability. Any probate referee so appointed may be called and examined as a witness by any party or by the court itself. The court shall fix the compensation, in an amount as determined by the court to be reasonable, but the fees shall not exceed similar fees for similar services in the community where the services are rendered, which may be taxed and allowed in like manner as other costs.

Connecticut General Statutes

Chapter 846 § 49-14. (a)

At any time within thirty days after the time limited for redemption has expired, any party to a mortgage foreclosure may file a motion seeking a deficiency judgment. Such motion shall be placed on the short calendar for an evidentiary hearing. Such hearing shall be held not less than fifteen days following the filing of the motion, except as the court may otherwise order. At such hearing the court shall hear the evidence, establish a valuation for the mortgaged property and shall render judgment for the plaintiff for the difference, if any, between such valuation and the plaintiff's claim. The plaintiff in any further action upon the debt, note or obligation, shall recover only the amount of such judgment.

Florida Statutes

Title XL, § 702.06

In all suits for the foreclosure of mortgages heretofore or hereafter executed the entry of a deficiency decree for any portion of a deficiency, should one exist, shall be within the sound judicial discretion of the court, but the complainant shall also have the right to sue at common law to recover such deficiency, provided no suit at law to recover such deficiency shall be maintained against the original mortgagor

in cases where the mortgage is for the purchase price of the property involved and where the original mortgagee becomes the purchaser thereof at foreclosure sale and also is granted a deficiency decree against the original mortgagor.

Idaho Statutes

Title 6, § 1-6-108

No court in the state of Idaho shall have jurisdiction to enter a deficiency judgment in any case involving a foreclosure of a mortgage on real property in any amount greater than the difference between the mortgage indebtedness, as determined by the decree, plus costs of foreclosure and sale, and the reasonable value of the mortgaged property, to be determined by the court in the decree upon the taking of evidence of such value.

Illinois Compiled Statutes

Chapter 770, § 70-16. H

The person conducting the sale shall promptly make a report to the court and upon motion and notice in accordance with court rules applicable to motions generally, the court shall conduct a hearing to confirm the sale. If the court finds that notice of the sale required with subsections B, C, D and E were given and that the sale was not conducted fraudulently, the court shall then enter an order confirming the sale and giving possession of the property to the purchaser. The confirmation order may also;

1. approve the receiver's fees and costs arising between the entry of any judgment or order appointing the receiver and the confirmation hearing;
2. provide for a personal judgment against any party for a deficiency.

Chapter 735, § 15-1580. (e)

In any order confirming a sale pursuant to the judgment of foreclosure, the court shall also enter a personal judgment for deficiency against any party (i) if otherwise authorized and (ii) to the extent requested in the complaint and proven upon presentation of the report of sale in accordance with Section 15-1508. Except as otherwise provided in this Article, a judgment may be entered for any balance of money that may be found due to the plaintiff, over and above the proceeds of the sale or sales, and enforcement may be had for the collection of such balance, the same as when the judgment is solely for the payment of money. Such judgment may be entered, or enforcement had, only in cases where personal service has been had upon the persons personally liable for the mortgage indebtedness, unless they have entered their appearance in the foreclosure action.

Iowa Code

§ 654.6

If the mortgaged property does not sell for sufficient to satisfy the execution, a general execution may be issued against the mortgagor, unless the parties have stipulated otherwise.

§ 654.16

If a sheriff's sale is ordered on agricultural land used for farming, as defined in section 175.2 , the mortgagor may, by a date set by the court but not later than ten days before the sale, designate to the court the portion of the land which the mortgagor claims as a homestead. The homestead may be any contiguous portion of forty acres or less of the real estate subject to the sheriff's sale. The homestead shall contain the residence of the mortgagor and shall be as compact as practicable.

If a homestead is designated, the court shall determine the fair market value of the designated homestead before the sheriff's sale. The court may consult with the county

appraisers appointed pursuant to section 450.24 , or with one or more independent appraisers, to determine the fair market value of the designated homestead.

The mortgagor may redeem the designated homestead by tendering the lesser of either any amount separately bid for the designated homestead at the sheriff's sale pursuant to procedures set forth in chapter 628 , or the fair market value, as determined pursuant to this section, of the designated homestead at any time within one year from the date of the sheriff's sale, pursuant to the procedures set forth in chapter 628 .

Louisiana Revised Statutes

§ 13-4106

A. Unless otherwise provided by law, if a mortgagee or other creditor takes advantage of a waiver of appraisement of his property, movable, immovable, or both, by a debtor, and the proceeds of the judicial sale thereof are insufficient to satisfy the debt for which the property was sold, the debt nevertheless shall stand fully satisfied and discharged insofar as it constitutes a personal obligation of the debtor. The mortgagee or other creditor shall not have a right thereafter to proceed against the debtor or any of his other property for such deficiency, except as otherwise provided by law or as provided in the next Subsection.

B. If a mortgage or pledge affects two or more properties, movable, immovable, or both, the judicial sale of any property so affected without appraisement shall not prevent the enforcement of the mortgage or pledge in rem against any other property affected thereby.

C. This Section is limited to judicial sales of mortgaged property and shall not apply to public or private sales of collateral subject to Chapter 9 of the Louisiana Commercial Laws or any similar statute.

§ 13-4363

A. Not less than seven days, exclusive of holidays, before the sale of seized property, the sheriff shall serve written notice on the debtor and on the seizing creditor, in the manner provided for the service of a citation, directing each to name an appraiser to value the property and to notify the sheriff of his appointment prior to the time stated in the notice, which shall be at least four days, exclusive of holidays, prior to the time of the sale. The appraisal of the debtor and seizing creditor shall be made and delivered to the sheriff at least two days, exclusive of holidays, prior to the time of the sale.

B. If there are two or more debtors or seizing creditors and these parties cannot agree as to which should act as or appoint an appraiser, and in any case where an appraisal is required prior to the judicial sale and which is not otherwise provided for in this Section, on the ex parte application of the sheriff or of any interested party, the court shall designate the party to act as or appoint the appraiser, and the notice required by Sub-section A of this Section shall be served on the party so designated.

Maine Revised Statutes

Title 14, § 713-6-6324

After first deducting the expenses incurred in making the sale, the mortgagee shall disburse the remaining proceeds in accordance with the provisions of the judgment. The mortgagee shall file a report of the sale and the disbursement of the proceeds therefrom with the court and shall mail a copy to the mortgagor at the mortgagor's last known address. This report need not be accepted or approved by the court, provided that the mortgagor or any other party in interest may contest the accounting by motion filed within 30 days of receipt of the report, but any such challenge may be for money only and does not affect the title to the real estate purchased by the highest bidder at the public sale. Any

deficiency must be assessed against the mortgagor and an execution must be issued by the court therefor. In the event the mortgagee has been the purchaser at the public sale, any deficiency is limited to the difference between the fair market value of the premises at the time of the public sale, as established by an independent appraisal, and the sum due the mortgagee as established by the court with interest plus the expenses incurred in making the sale. Any surplus must be paid to the mortgagor, the mortgagor's successors, heirs or assigns in the proceeding. If the mortgagor has not appeared personally or by an attorney, the surplus must be paid to the clerk of courts, who shall hold the surplus in escrow for 6 months for the benefit of the mortgagor, the mortgagor's successors, heirs or assigns and, if the surplus remains unclaimed after 6 months, the clerk shall pay the surplus to the Treasurer of State to be credited to the General Fund until it becomes unclaimed under the Uniform Unclaimed Property Act, and report and pay it to the State in accordance

Michigan Compiled Laws

§ 600.3150

In the original judgment in foreclosure cases the court shall determine and adjudge which defendants, if any, are personally liable on the land contract or for the mortgage debt. The judgment shall provide that upon the confirmation of the report of sale that if either the principal, interest, or costs ordered to be paid, is left unpaid after applying the amount received upon the sale of the premises, the clerk of the court shall issue execution for the amount of the deficiency, upon the application of the attorney for the plaintiff, without notice to the defendant or his attorney. The court may order and compel the delivery of the possession of the premises to the purchaser at the sale.

§ 600.3280

When, in the foreclosure of a mortgage by advertisement, any sale of real property has been made after February 11, 1933, or shall be hereafter made by a mortgagee, trustee, or other person authorized to make the same pursuant to the power of sale contained therein, at which the mortgagee, payee or other holder of the obligation thereby secured has become or becomes the purchaser, or takes or has taken title thereto at such sale either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation, or any other person liable thereon, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and set-off to the extent only of the amount of the plaintiff's claim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and such showing shall constitute a defense to such action and shall defeat the deficiency judgment against him, either in whole or in part to such extent. This section shall not affect nor apply to the rights of other purchasers or of innocent third parties, nor shall it be held to affect or defeat the negotiability of any note, bond or other obligation secured by such mortgage, deed of trust or other instrument. Such proceedings, as aforesaid, shall in no way affect the title of the purchaser to the lands acquired by such purchase. This section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any chancery sale heretofore or hereafter made and confirmed.

Minnesota Statutes

§ 582.30

Subdivision 1. **Deficiency allowed.** (a) Except as provided in this section, a person holding a mortgage may obtain a deficiency judgment against the mortgagor if the amount a person holding a mortgage receives from a foreclosure sale is less than: (1) the amount remaining unpaid on the mortgage under chapter 580; or (2) the amount of the judgment entered under chapter 581.

(b) Except as provided in subdivisions 3 and 5, the judgment may not be for more than the difference between the amount received from the foreclosure sale less expenses and costs and: (1) for a foreclosure by advertisement, the total amount that attaches to the sale proceeds under chapter 580; or (2) for a foreclosure by action, the amount of the judgment entered under chapter 581.

(c) Subdivisions 3 to 9 do not apply to mortgages entered or amended on or after May 22, 1999, if the mortgaged property is used in agricultural production only by a tenant who is not the mortgagor.

Subd. 2. **Not if six-month or five-week redemption period.** A deficiency judgment is not allowed if a mortgage is foreclosed by advertisement under chapter 580, and has a redemption period of six months under section 580.23, subdivision 1, or five weeks under section 582.032.

Subd. 3. **Ag property mortgage entered after 3/22/1986.** (a) If a mortgage entered after March 22, 1986 on property used in agricultural production is foreclosed and sold, a deficiency judgment may only be obtained by filing an action for a deficiency judgment and a determination of the fair market value of the property within 90 days after the foreclosure sale. In the action all issues of fact, including determination of the fair market value of the property, shall be tried by a jury unless a jury trial is waived as provided in Minnesota district court rules. A court may allow a deficiency judgment only if it determines that the sale of the property was conducted in a commercially reasonable

manner.

(b) The amount of the deficiency judgment is limited to the difference of the fair market value of the property, and the amount remaining unpaid on the mortgage if the foreclosure is under chapter 580 or the amount of the judgment if the foreclosure is under chapter 581. The property may not be presumed to be sold for its fair market value. A party adversely affected by a deficiency judgment may submit evidence relevant to establishing the fair market value of the property. Notice of the time and place where the action for the deficiency judgment and the determination of fair market value of the property is to be heard must be given to all parties adversely affected by the judgment.

Montana Code

§ 71-1-222. (2)

If it appears from the sheriff's return that the proceeds are insufficient and a balance still remains due, judgment can then be docketed for the balance against the defendant or defendants personally liable for the debt, and it becomes a lien upon the real estate of the judgment debtor, as in other cases on which execution may be issued.

Nevada Revised Statutes

§ 40.457

1. Before awarding a deficiency judgment under NRS 40.455, the court shall hold a hearing and shall take evidence presented by either party concerning the fair market value of the property sold as of the date of foreclosure sale or trustee's sale. Notice of such hearing shall be served upon all defendants who have appeared in the action and against whom a deficiency judgment is sought, or upon their attorneys of record, at least 15 days before the date set for hearing.

2. Upon application of any party made at least 10 days before the date set for the hearing the court shall, or upon its own motion the court may, appoint an appraiser to appraise the property sold as of the date of foreclosure sale or trustee's sale. Such appraiser shall file with the clerk his appraisal, which is admissible in evidence. The appraiser shall take an oath that he has truly, honestly and impartially appraised the property to the best of his knowledge and ability. Any appraiser so appointed may be called and examined as a witness by any party or by the court. The court shall fix a reasonable compensation for the appraiser, but his fee shall not exceed similar fees for similar services in the county where the encumbered land is situated.

New Jersey Statutes

Title 2A, § 50-3

The obligor in any bond or note specified in section 2A:50-2 of this Title, with respect to any bond given after March 29, 1933, and with respect to any note given after the effective date of this amendatory act may file an answer in the action for deficiency [redacted], disputing the amount of the deficiency [redacted]sued for. In that event both parties may introduce evidence as to the fair market value of the mortgaged premises at the time of the sale thereof in the foreclosure [redacted]action, and the court, with or without a jury, shall determine the amount of such deficiency [redacted], by deducting from the debt secured the amount determined as the fair market value of the premises. If all parties to the action shall so agree, the court may accept as the fair market value of the mortgaged premises the value fixed by three appraisers, to be named by agreement of all the parties to the action, which agreement shall be evidenced by a stipulation to be filed in the action.

New Mexico Statutes

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§ 48-10-17

A. Except as provided in Subsections D and E of this section, a separate civil action may be commenced to recover a deficiency judgment for the balance due on the contract for which the deed of trust was given as security. The deficiency judgment shall be for an amount equal to the sum of the total amount owing the beneficiary as of the date of the sale, as determined by the court, and, if applicable, the amount owing on all prior mortgages, deeds of trust, liens and encumbrances and real estate contracts with interest less the sale price at the sale by the trustee of the trust real estate. Any deficiency judgment recovered shall include interest on the amount of the deficiency from the date of the sale at the rate provided in the deed of trust or contract, together with any costs of the action.

B. If no action is commenced for a deficiency judgment as provided in Subsection A of this section, the proceeds of the sale, regardless of amount, shall be deemed to be in full satisfaction of the debt and no right to recover a deficiency in any separate civil action shall exist.

C. Except as provided in Subsections D and E of this section, the Deed of Trust Act does not preclude a beneficiary or a trustee from foreclosing a deed of trust in the same manner provided by law for the foreclosure of mortgages on real estate.

D. A deed of trust not encumbering real estate occupied by a low-income household may, by express language, validly prohibit the recovery of any balance due after the trust real estate is sold or after the deed of trust is foreclosed in the manner provided by law for the foreclosure of mortgages on real estate.

E. No deficiency judgment shall be sought or obtained under any deed of trust encumbering real estate occupied by a low-income household. A deed of trust encumbering real estate occupied by a low-income household shall expressly prohibit the recovery of any balance due after the trust real estate is

sold or after the deed of trust is foreclosed in the manner provided by law for the foreclosure of mortgages on real estate.

F. No deficiency in recovery of any balance due after the sale of trust real estate encumbering real estate occupied by a low-income household shall be reported to any credit reporting agencies or disclosed to any person, other than the trustor, unless the disclosure is required by law or regulation.

G. For the purposes of Subsections D, E and F of this section, "low-income household" means a household that the New Mexico mortgage finance authority certifies as low income at the time of the closing of the contract.

New York Consolidated Laws

Article 13, § 1371

1. If a person who is liable to the plaintiff for the payment of the debt secured by the mortgage is made a defendant in the action, and has appeared or has been personally served with the summons, the final judgment may award payment by him of the whole residue, or so much thereof as the court may determine to be just and equitable, of the debt remaining unsatisfied, after a sale of the mortgaged property and the application of the proceeds, pursuant to the directions contained in such judgment, the amount thereof to be determined by the court as herein provided.

2. Simultaneously with the making of a motion for an order confirming the sale, provided such motion is made within ninety days after the date of the consummation of the sale by the delivery of the proper deed of conveyance to the purchaser, the party to whom such residue shall be owing may make a motion in the action for leave to enter a deficiency judgment upon notice to the party against whom such judgment is sought or the attorney who shall have appeared for such party in such action. Such notice shall be served personally or in such other manner as the court may

direct. Upon such motion the court, whether or not the respondent appears, shall determine, upon affidavit or otherwise as it shall direct, the fair and reasonable market value of the mortgaged premises as of the date such premises were bid in at auction or such nearest earlier date as there shall have been any market value thereof and shall make an order directing the entry of a deficiency judgment Such deficiency judgment shall be for an amount equal to the sum of the amount owing by the party liable as determined by the judgment with interest, plus the amount owing on all prior liens and encumbrances with interest, plus costs and disbursements of the action including the referee`s fee and disbursements, less the market value as determined by the court or the sale price of the property whichever shall be the higher.

3. If no motion for a deficiency judgment shall be made as herein prescribed the proceeds of the sale regardless of amount shall be deemed to be in full satisfaction of the mortgage debt and no right to recover any deficiency in any action or proceeding shall exist.

4. Notwithstanding the foregoing provisions and irrespective of whether a motion for a deficiency judgment shall have been made or, if made, shall have been denied, the court shall direct that all moneys remaining in the hands of a receiver of the rents and profits appointed in the action, after the payment of the receiver`s fees and the expenses of the receivership, or any moneys remaining in the hands of a mortgagee in possession or an assignee of the rents and profits of the premises, shall be paid to the plaintiff to the extent of the amount, if any, by which the judgment of foreclosure and sale exceeds the amount paid for the property upon the sale.

North Carolina General Statutes

§ 45-21.36

When any sale of real estate has been made by a mortgagee, trustee, or other person authorized to make the same, at which the mortgagee, payee or other holder of the obligation thereby secured becomes the purchaser and takes title either directly or indirectly, and thereafter such mortgagee, payee or other holder of the secured obligation, as aforesaid, shall sue for and undertake to recover a deficiency judgment against the mortgagor, trustor or other maker of any such obligation whose property has been so purchased, it shall be competent and lawful for the defendant against whom such deficiency judgment is sought to allege and show as matter of defense and offset, but not by way of counterclaim, that the property sold was fairly worth the amount of the debt secured by it at the time and place of sale or that the amount bid was substantially less than its true value, and, upon such showing, to defeat or offset any deficiency judgment against him, either in whole or in part: Provided, this section shall not affect nor apply to the rights of other purchasers or of innocent third parties, nor shall it be held to affect or defeat the negotiability of any note, bond or other obligation secured by such mortgage, deed of trust or other instrument: Provided, further, this section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure suit nor to any sale made and confirmed prior to April 18, 1933.

Oklahoma Statutes

§46-43. A.2.d

in a mortgage transaction not involving the mortgagor's homestead, unless otherwise agreed, the mortgagor shall be liable for any deficiency between the amount obtained by the mortgagee from the sale and the amount of the indebtedness, interest, and the costs and expenses of sale including the amount of attorney's fees fixed in the mortgage by agreement, unless a part or all of the fees are waived by the

parties or the amount fixed is found by a court to be unconscionable. If such fees are found to be unconscionable or no fees are fixed in the mortgage by agreement a court may allow reasonable attorney's fees. Any action for a deficiency pursuant to the provisions of this subparagraph shall be commenced within ninety (90) days after the date of the sale. If, in such action, the mortgagor shall establish that the fair market value of the property as of the date of the sale exceeded the sale price, then the deficiency otherwise obtainable under this subparagraph shall be reduced by the amount of such excess.

South Carolina Code of Laws

§ 29-3-660

In actions to foreclose mortgages the court may adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that may remain unsatisfied after a sale of the mortgaged premises in cases in which the mortgagor shall be personally liable for the debt secured by such mortgage and if the mortgage debt be secured by the covenant or obligation of any person other than the mortgagor the plaintiff may make such person a party to the action and the court may adjudge payment of the residue of such debt remaining unsatisfied after a sale of the mortgaged premises against such other person and may enforce such judgment as in other cases.

§ 29-3-680. (A)

In any real estate foreclosure proceeding a defendant against whom a personal judgment is taken or asked, whether he has theretofore appeared in the action or not, may within thirty days after the sale of the mortgaged property apply by verified petition to the clerk of court in which the decree or order of sale was taken for an order of appraisal.

§ 29-3-700

Upon the filing of such petition and deposit with the clerk of a sufficient sum to pay the costs of the subsequent proceedings he shall issue an order that the property be appraised at its true value as of the date of sale by three disinterested individuals who must be state-certified general real estate appraisers as defined in Section 40-60-20(20), state-certified residential real estate appraisers as defined by Section 40-60-20(21), or state-licensed real estate appraisers as defined by Section 40-60-20(22), who shall not be parties to the action or connected in business with or related by blood or marriage within the sixth degree to any such party.

§ 29-3-710

In his petition the petitioner shall designate one appraiser and within ten days after service of a copy of the order upon the judgment creditor or his attorney of record he shall designate to the clerk another appraiser, whereupon the court having jurisdiction of the action or any judge thereof shall appoint a third, and the said court or judge shall make the appointment herein provided for the judgment creditor if he does not avail himself of his right within the time above prescribed.

§ 29-3-720

The board of appraisers as so constituted shall proceed to view and value the mortgaged property and all or a majority thereof shall make a sworn return within thirty days from their appointment of the true value of the property as of the date of sale, taking into consideration sale value, cost and replacement value of improvements, income production and all other proper elements which, in their discretion, enter into the determination of true value.

§ 29-3-750

The petitioner or the judgment creditor may appeal from the return of the appraisers upon notice stating the ground of such appeal served upon the other party within ten days after notice of the filing of the return, such appeal being to the

court having jurisdiction of the action or any judge thereof, who shall hear the appeal without a jury in open court or at chambers upon affidavits or oral testimony as he deems advisable. Such court may confirm the return or order a new appraisal upon such terms as he may deem equitable and an appeal from his order or decree shall lie as in other equity cases.

South Dakota Codified Laws

§ 21-48-14

When any sale of real estate has been made by a mortgagee, trustee, or other person authorized to make the same at which the mortgagee, payee, or other holder of the obligation thereby secured becomes the purchaser and takes title, either directly or indirectly, before such mortgagee, payee, or other holder of the secured obligation as aforesaid, shall be entitled to any deficiency judgment against the mortgagor, trustor, or other maker of any such obligation whose property has been so purchased, he shall first establish to the satisfaction of the court in which such action for a deficiency judgment is pending that the property covered by such mortgage sold at foreclosure sale for its true market value or more at the time of such sale, and in adjudging any such deficiency the court in arriving at the amount of such judgment shall deduct from the amount of the mortgage indebtedness remaining unsatisfied after the sale of the mortgaged property the difference between the true market value of said property at the time of such sale and the amount for which it sold, if such amount was less than the true market value at the time of sale.

This section shall not affect nor apply to the rights of other purchasers or of innocent third parties nor shall it be held to affect or defeat the negotiability of any note, bond, or other obligation secured by such mortgage, deed of trust, or other instrument.

This section shall not apply to foreclosure sales made pursuant to an order or decree of court nor to any judgment sought or rendered in any foreclosure by action nor to any sale confirmed prior to July 1, 1937.

Texas Statutes

Property Code § 51.003

(a) If the price at which real property is sold at a foreclosure sale under Section 51.002 is less than the unpaid balance of the indebtedness secured by the real property, resulting in a deficiency, any action brought to recover the deficiency must be brought within two years of the foreclosure sale and is governed by this section.

(b) Any person against whom such a recovery is sought by motion may request that the court in which the action is pending determine the fair market value of the real property as of the date of the foreclosure sale. The fair market value shall be determined by the finder of fact after the introduction by the parties of competent evidence of the value. Competent evidence of value may include, but is not limited to, the following: (1) expert opinion testimony; (2) comparable sales; (3) anticipated marketing time and holding costs; (4) cost of sale; and (5) the necessity and amount of any discount to be applied to the future sales price or the cashflow generated by the property to arrive at a current fair market value.

(c) If the court determines that the fair market value is greater than the sale price of the real property at the foreclosure sale, the persons against whom recovery of the deficiency is sought are entitled to an offset against the deficiency in the amount by which the fair market value, less the amount of any claim, indebtedness, or obligation of any kind that is secured by a lien or encumbrance on the real property that was not extinguished by the foreclosure, exceeds the sale price. If no party requests the determination

of fair market value or if such a request is made and no competent evidence of fair market value is introduced, the sale price at the foreclosure sale shall be used to compute the deficiency.

(d) Any money received by a lender from a private mortgage guaranty insurer shall be credited to the account of the borrower before the lender brings an action at law for any deficiency owed by the borrower. However, the credit required by this subsection does not apply to the exercise by a private mortgage guaranty insurer of its subrogation rights against a borrower or other person liable for any deficiency.

Utah Code

§ 78-37-2

If it appears from the return of the officer making the sale that the proceeds are insufficient and a balance still remains due, judgment therefor must then be docketed by the clerk and execution may be issued for such balance as in other cases; but no general execution shall issue until after the sale of the mortgaged property and the application of the amount realized as aforesaid.

Vermont Statutes

Title 12, § 163-4532 (g)

The sale shall be held on the premises where the real estate is located except it may be held elsewhere if another place for sale is directed by the court or, in the case of nonjudicial foreclosure, agreed to in writing by the mortgagor and the mortgagee not less than 60 days nor more than 90 days before the sale. At the sale, the premises shall be sold to the highest bidder in conformance with the terms of sale set forth in the foreclosure notice. The mortgagor is entitled to receive any surplus from the proceeds of the sale and the mortgagor shall be liable for any deficiency as determined by a subsequent action for a deficiency judgment. The mortgagee or person conducting the sale may interplead any sale

proceeds in excess of the indebtedness and expenses secured by the mortgage in the event there are any liens of record against the real estate.

Washington Revised Code

§ 61.12.070

When there is an express agreement for the payment of the sum of money secured contained in the mortgage or any separate instrument, the court shall direct in the decree of foreclosure that the balance due on the mortgage, and costs which may remain unsatisfied after the sale of the mortgaged premises, shall be satisfied from any property of the mortgage debtor: PROVIDED, HOWEVER, That in all cases where the mortgagee or other owner of such mortgage has expressly waived any right to a deficiency judgment in the complaint, as provided by RCW 6.23.020, there shall be no such judgment for deficiency, and the remedy of the mortgagee or other owner of the mortgage shall be confined to the sale of the property mortgaged.

Wisconsin Statutes & Annotations

§ 846.04. (1)

The plaintiff may, in the complaint, demand judgment for any deficiency that may remain due the plaintiff after sale of the mortgaged premises against every party who is personally liable for the debt secured by the mortgage. Judgment may be rendered for any deficiency remaining after applying the proceeds of sale to the amount due. The judgment for deficiency shall be ordered in the original judgment and separately rendered against the party liable on or after the confirmation of sale. The judgment for deficiency shall be entered in the judgment and lien docket and, except as provided in subs. (2) and (3), enforced as in other cases. A mortgage foreclosure deficiency judgment entered on property devoted primarily to agricultural use, as defined in

s. 91.01 (5), on and after October 14, 1997, shall be recorded as an agriculture judgment.

§ 846.165. (2)
In case the mortgaged premises sell for less than the amount due and to become due on the mortgage debt and costs of sale, there shall be no presumption that such premises sold for their fair value and no sale shall be confirmed and judgment for deficiency rendered, until the court is satisfied that the fair value of the premises sold has been credited on the mortgage debt, interest and costs.

Wyoming Statutes

§ 34-4-113. (c)
Subject to the other provisions of this section, a mortgagee shall account to and pay a mortgagor for any surplus, and the mortgagor is liable for any deficiency.